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AND BY THE

## COURT OF APPEAL

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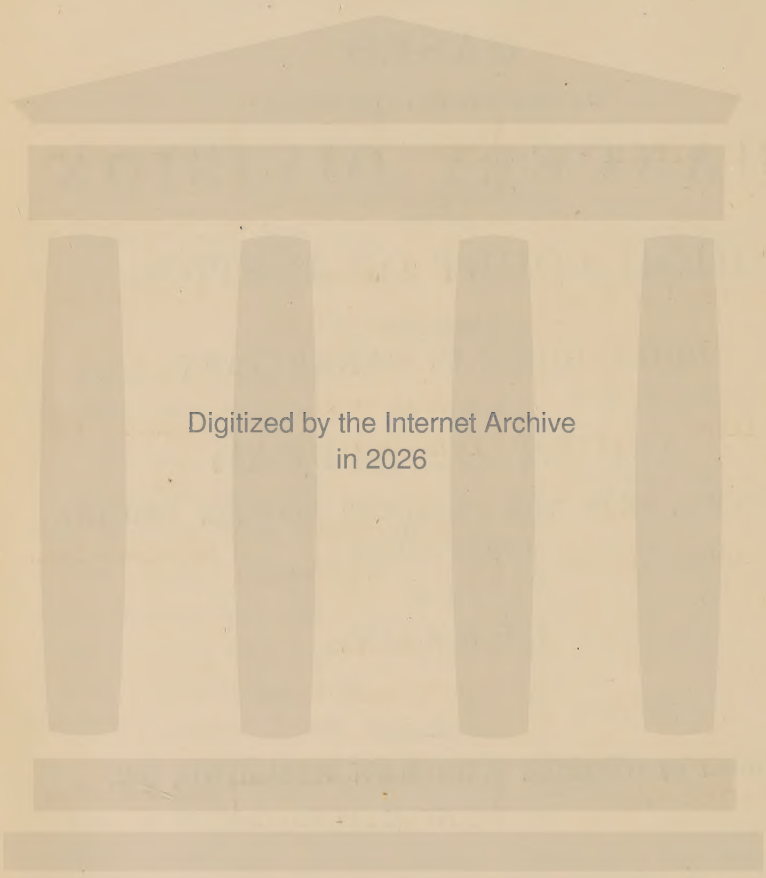

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# CASES

DETERMINED BY THE

# CHANCERY DIVISION

OF THE

# HIGH COURT OF JUSTICE

AND BY THE

## CHIEF JUDGE IN BANKRUPTCY

AND BY THE

# COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

# LUNACY.

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## *Ex parte* ISAACS. *In re* BAUM. (No. 2.)

C. A. 1878 Nov. 14.

*Practice—Appeal—Failure to give Security for Costs—Motion to dismiss for want of Prosecution—Costs of Motion.*

On the 26th of June an Appellant in bankruptcy was ordered to give additional security for the costs of the appeal. On the 4th of November, the security not having been given, the Respondents' solicitor, without having previously written to the Appellant's solicitors, gave notice of motion to dismiss the appeal for want of prosecution. On the 13th of November the additional security was given, and on the 14th of November the motion to dismiss came on to be heard:—

*Held*, that the Appellant must pay the costs of the motion, and that the appeal could not be heard until he had done so.

Statement.

APPEALS from two decisions of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy, having been presented by the trustee in the liquidation of *John Baum*, and the usual deposit of £20 having been made in each case, the Court of Appeal on the 26th of June, 1878, on the application of the Respondents, ordered that

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Statement.

the deposit in each case should be increased to £70, and that the proceedings should be stayed until the additional deposit had been made (1). On the 2nd of November, 1878, the additional deposit not having been made, the Court of Appeal, on the application of the Respondents, ordered that the appeals should be placed in the paper on the first day appointed for the hearing of bankruptcy appeals, with a view to the Respondents moving to dismiss the appeals for want of prosecution. At this time the 7th of November had been appointed as the first day for the hearing of bankruptcy appeals, but on the 4th of November notice was given by the Court that bankruptcy appeals would not be heard until the 14th of November. On the 4th of November the Respondents served the Appellant with notice of a motion, to be made on the 7th of November, or on the first day on which the Court should sit in bankruptcy, to dismiss the appeals respectively for want of prosecution, with costs of the motion and of the appeals. On the 13th of November the Appellant made the additional deposit of £50 in each case, and gave the Respondents' solicitors notice that he had done so. The Respondents' solicitors replied that they should bring on the motion on the question of costs, inasmuch as all the costs of the motion had been already incurred.

The motion now came on to be heard.

Argument.

*E. C. Willis*, and *Herbert Reed*, for the Respondents:—

The Appellant ought to pay the costs of the motion, which has been rendered necessary by his own unreasonable delay.

*Swanston*, Q.C., and *Nicholson*, for the trustee:—

The appeal is really brought by the creditors, and it was necessary to summon meetings to consider whether money should be raised to pay the increased deposit. The hearing of the appeals has not been delayed, for this is the first day since the Long Vacation on which they could have been heard. Before serving the notice of this motion the Respondents ought to have written a letter to the Appellant's solicitors. By not doing this unnecessary costs have been incurred.

(1) 9 Ch. D. 271.

JAMES, L.J.:—

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I think that the Respondents were fully justified in giving this notice of motion. There had been great delay in paying the money, and they took that step which the practice of the Court entitled them to take. The Appellant, on receiving the notice, ought to have paid the money at once, and to have tendered the Respondents 20*s.* for the costs of their notice of motion. The Appellant must pay the costs of the motion, and they must be paid before the appeal can come on to be heard.

BAGGALLAY and THESIGER, L.JJ., concurred.

Baggallay and Thesiger, L.JJ.

Solicitor for Respondents: *W. H. Roberts.*
Solicitors for Appellant: *Evans & Eagles.*

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## *Ex parte* LEAROYD. *In re* FOULDS.

C. A. 1878 C. J. B. *July* 8. C. A. *Nov.* 14; *Dec.* 5.

*Adjudication of Bankruptcy—Rights of Third Person—Act of Bankruptcy—Relation back of Trustee's Title—Bill of Sale Holder—Appeal—"Person aggrieved"—Limit of Time for appealing—Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *ss.* 8, 10, 11, 71—*Bankruptcy Rules,* 1870, *r.* 143.

By virtue of sects. 10 and 11 of the *Bankruptcy Act*, 1869, an adjudication of bankruptcy is, so long as it stands, conclusive as against a third person; *e.g.*, the holder of a bill of sale executed by the bankrupt, that the act of bankruptcy, on which the adjudication was professedly founded, was in fact committed, and that the title of the trustee relates back to that act of bankruptcy.

But a third person, whose title to property is affected by the adjudication, is under sect. 71 a "person aggrieved" by it, and is entitled to appeal from it.

Whether the limit of twenty-one days for bringing an appeal, fixed by rule 143 of the Bankruptcy Rules, 1870, applies to a third person, *quære.*

Decision of *Bacon*, C.J., reversed.

Leave was given to appeal to the House of Lords.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy. Statement.

On the 30th of August, 1877, *Joseph Foulds*, a tailor at *Halifax*, executed in favour of *George Payne* a bill of sale of his household furniture, stock-in-trade, and other effects, by way of security for

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Statement

the payment of a sum of £60 advanced to him by *Payne*, and £20 as consideration for the advance. The bill of sale was not registered. The goods remained in the apparent possession of the mortgagor until the 1st of January, 1878, when *Payne* removed them. On the 3rd of January, 1878, a bankruptcy petition was presented against *Foulds* in the *Halifax* County Court by a creditor named *Blakey*. The petition alleged that *Foulds* had committed an act of bankruptcy, inasmuch as he, being a trader, departed from his dwelling-house on the 31st of December, 1877, with intent to defeat or delay his creditors. On the 3rd of January an order of adjudication was made on the petition, the order stating that it was made "upon proof satisfactory to the Court of the debt of the Petitioner, of the trading, and of the act of bankruptcy alleged to have been committed" by the debtor, and the order was afterwards advertised in the usual way in the *London Gazette*. On the 8th of January the goods removed by *Payne* were sold on his behalf. The trustees in the bankruptcy claimed the proceeds of the sale, and on their application the Judge of the County Court, on the 22nd of May, 1878, ordered the money to be paid to them. *Payne* appealed to the Chief Judge.

The appeal was heard on the 8th of July, 1878.

Argument.

*Winslow*, Q.C., and *Finlay Knight*, for the Appellant:—

The evidence shews that the debtor did not in fact depart from his dwelling-house on the 31st of December with intent to defeat or delay his creditors.

[They were stopped by the Court.]

*E. C. Willis*, for the trustees:—

Sections 10 and 11 of the Act shew that a bill of sale holder is conclusively bound by the adjudication so long as it stands, and cannot dispute that the act of bankruptcy on which the adjudication professedly proceeded was in fact committed. He could appeal from the adjudication: *Ex parte Ellis* (1).

Judgment, C. J. B.

BACON, C.J.:—

In this case an adjudication has been made; it is an official act,

(1) 2 Ch. D. 797.

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*Ex parte* LEAROYD. *In re* FOULDS.

Judgment, C. J. B.

which, unless and until reversed, must have its full effect. If anybody wants to upset the adjudication, he must proceed to do so in the regular way. But that is not the position of the present Appellant. He does not dispute the adjudication. He admits it, and says, "Well and good, I don't dispute the adjudication, but you must prove that there was an act of bankruptcy before I took possession." Of such an act of bankruptcy having been committed, there is, in my opinion, not a particle of evidence. It may be that such an act was committed, but upon the evidence I have not the slightest reason to believe that it was.

I look upon the case as one wholly undefended.

The appeal must be allowed, and the Appellant is entitled to his costs.

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From this decision the trustees appealed. The appeal was heard on the 14th of November, 1878.

Argument.

*E. C. Willis*, for the trustees:—

Sect. 10 (1) of the *Bankruptcy Act*, 1869, makes the advertisement in the *Gazette* conclusive on third persons that the adjudication was duly made, which it could not have been unless the act of bankruptcy on which it professed to be founded was in fact committed. By sect. 8, at the hearing of the petition the Court is to

(1) Sect. 10: "A copy of an order of the Court adjudging the debtor to be bankrupt shall be published in the *London Gazette*, and shall be advertised locally in such manner (if any) as may be prescribed, and the date of such order shall be the date of the adjudication for the purposes of this Act, and the production of a copy of the *Gazette* containing such order as aforesaid shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt, and of the date of the adjudication."

Sect. 11: "The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt; or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to and to commence at the time of the first of the acts of bankruptcy that may be proved to have been committed by the bankrupt within twelve months next preceding the order of adjudication; but the bankruptcy shall not relate to any prior act of bankruptcy, unless it be that at the time of committing such prior act the bankrupt was indebted to some creditor or creditors in a sum or sums sufficient to support a petition in bankruptcy, and unless such debt or debts are still remaining due at the time of the adjudication."

C. A. 1878 *Ex parte* LEAROYD. *In re* FOULDS. Argument.

require proof of the act of bankruptcy, as well as of the debt of the petitioning creditor, and of the trading (if necessary), and "if satisfied with such proof, shall adjudge the debtor to be bankrupt." A bill of sale holder whose title is affected by the adjudication is a "person aggrieved" by the order within the meaning of sect. 71, and is entitled therefore to appeal from it: *Ex parte Ellis* (1). But, so long as the adjudication stands, it is conclusive on every one that the act of bankruptcy on which it is founded was committed, and then, by sect. 11, the trustee's title relates back to that act of bankruptcy.

*Winslow*, Q.C., and *Finlay Knight*, for the bill of sale holder:—

The adjudication is made behind the back of the bill of sale holder; it could not have been intended that he should be unable to dispute the act of bankruptcy on which it is professedly founded. By rule 143 of the Bankruptcy Rules, 1870, an appeal must be brought within twenty-one days, and a stranger might not know of the adjudication for months after it was made. The advertisement in the *Gazette* does not state the act of bankruptcy.

12 Ch D 906

[JAMES, L.J.:—Possibly the limit of time for appealing applies only to the parties to the order. We have allowed cross appeals to be presented after the expiration of the twenty-one days, as in *Ex parte Hayward* (2).]

A third person may be conclusively bound by the adjudication, but it does not follow that he is bound by all the alleged requisites to the making of it. The debts of petitioning creditors have been constantly disputed after an adjudication, and have been disallowed or altered in amount. In bankruptcy the Court has constantly gone behind a judgment. In *Revell* v *Blake* (3) it was held that an adjudication made by a County Court was conclusive that that Court had jurisdiction over the debtor, but, though the adjudication was founded on non-compliance with the requirements of a debtor's summons issued against the debtor as a non-trader, it was held that the trustee was at liberty to prove that the debtor was in fact a trader. The present application was made by the

(1) 2 Ch. D. 797.
(2) Law Rep. 6 Ch. 546.
(3) Law Rep. 7 C. P. 300; Ibid. 8 C. P. 533.

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trustee against the Respondent; why should the Respondent have to make another application of his own to annul the adjudication? For that purpose he would have to serve the bankrupt, who, as well as the other creditors, may be quite content with the adjudication. And, if the adjudication was annulled, all the proceedings which have been taken under it would be rendered void. Dividends may have been paid, and they would have to be recalled. Under the former Bankruptcy Acts it was always held that strangers were not affected.

[BAGGALLAY, L.J., referred to sects. 233, 234, and 235 of the *Bankruptcy Act* of 1849, 12 & 13 Vict. c. 106 (1).]

Sect. 11 is conclusive only that the trustee is trustee of the bankrupt's estate. The question is whether this property forms part of the estate, and when the trustee seeks to affect the rights of a third person the *onus* is on him to prove the act of bankruptcy on which he relies. The words of sects. 10 and 11 are not strong enough to alter the old law as regards third persons.

JAMES, L.J.:— Judgment, C. A. James, L.J.

I cannot see how to escape from the plain words of sects. 10 and 11 of the Act. It is said that inconvenience and hardship will result from putting a literal construction upon them. If there is any hardship which is not sufficiently met by the provisions of

(1) Sect. 233: "If the bankrupt shall not" (within a specified time) "have commenced an action, suit, or other proceeding to dispute or annul the fiat, or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the Gazette containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the Gazette to bear date."

Sections 234 and 235 enabled the other party or parties to actions or suits, other than those mentioned in sect. 233, brought by or against the assignees, to dispute the petitioning creditor's debt, the trading, or the act of bankruptcy, if he or they should have given notice in writing to the assignees before a specified time of his or their intention so to do.

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sect. 71 and the decision of this Court in *Ex parte Ellis* (1), that is a matter to be dealt with by the Legislature, who are about to try their hands on another amendment of the bankruptcy law. It is material to consider the history of these sections. According to my recollection, it was formerly open to any one, even the bankrupt himself, to dispute the title of the assignee under the adjudication. That was thought to be an inconvenient state of things, considering what the effect of an adjudication of bankruptcy is on the *status* of the bankrupt, not only in this country, but also in other countries, by reason of international comity. It was very inconvenient that this *status* should be open to dispute over and over again. Then came the Act of 1849, which provided that the adjudication was to be binding as against the bankrupt himself and any person who was bound to pay money either to him or his assignee. A person who was bound to pay money to the bankrupt could not allege that the title to it was not in the assignee. Then sects. 234 and 235 contained special provisions with regard to other third persons. That was the state of the law under the Act of 1849, and it was not altered by the Act of 1861. Then came the Act of 1869, which is now in force. It swept away all those particular provisions, and substituted the one general provision which is contained in sect. 10. [His Lordship read sect. 10.] A man cannot be "duly" adjudged a bankrupt, unless the great requisite of all exists, that he has committed an act of bankruptcy. That is the capital offence of which he must have been guilty before he can be "duly" adjudged a bankrupt. That he has been "duly" adjudged a bankrupt, necessarily involves the previous commission of an act of bankruptcy. The mere fact that an adjudication has been made could have been proved without the aid of sect. 10. That section may, however, only involve this, that some act of bankruptcy had been committed before the adjudication was made. But then comes sect. 11, which has no operation at all as between the bankrupt and the trustee. The bankrupt has no rights whatever; all his rights have been transferred to the trustee. The mere fact that sect. 11 is dealing with the relation back of the trustee's title, shews that it is dealing with the rights of third persons, and not merely with the rights of

(1) 2 Ch. D. 797.

the bankrupt and persons indebted to him. The adjudication in the present case is based on a particular act of bankruptcy which is alleged in the petition. [His Lordship referred to the form of the adjudication.] The act of bankruptcy alleged was that the bankrupt absented himself from his dwelling-house on a particular day, with intent to defeat or delay his creditors, and by the adjudication it was conclusively settled that he had committed that act of bankruptcy. Then sect. 11 goes on to provide that, by way of enlargement of the trustee's title, he may go behind the act of bankruptcy on which the adjudication was founded, and may, under certain circumstances and subject to certain limitations, prove that other earlier acts of bankruptcy have been committed, and if this is done the trustee's title is to relate back to the earliest act of bankruptcy which is proved to have been committed within twelve months before the adjudication. This, however, is to be proved by evidence, whereas the act of bankruptcy on which the adjudication is founded is proved by the production of the adjudication itself. It seems to me impossible to evade the words of these sections. The decision in *Revell* v. *Blake* (1) was quite consistent with this view. There it was held that the adjudication itself was conclusive evidence that the Court which made it had jurisdiction in the case, but that, where the adjudication was founded on an act of bankruptcy which could be committed equally whether the bankrupt was a trader or not, there was nothing in the Act to prevent the trustee from shewing that, though the bankrupt had been described as a non-trader, he was really a trader. I am of opinion, therefore, that we must reverse the decision of the Chief Judge.

BAGGALLAY, L.J.:— Baggallay, L.J.

I am of the same opinion, though I was at one period of the argument inclined to think that the decision of the Chief Judge was correct. But it seems to me impossible to evade the language of sects. 10 and 11. Sect. 10 says that the production of the advertisement of the adjudication is to be conclusive evidence "in all legal proceedings" of the debtor having been duly adjudged a bankrupt. At first sight one might think that reference was made

(1) Law Rep. 7 C. P. 300; Ibid. 8 C. P. 533.

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only to proceedings between the persons who were parties to the proceedings in the Court of Bankruptcy. But if we refer to the provisions of the Act of 1849, I think it was clearly the intention of the Legislature that sect. 10 of the present Act should apply to all proceedings whatever. Sect. 233 of the Act of 1849 is replaced by sect. 10 of the present Act, which contains a general provision, applying to all legal proceedings, that the adjudication itself is to be conclusive evidence that it was duly made. If we go back to sect. 8, we find that before making an adjudication the Court is to require proof of the act of bankruptcy alleged in the petition, and, if satisfied with the proof of that and the other requisites, shall adjudge the debtor to be bankrupt. If the matter rested here, I think we must take it that from the adjudication itself it is to be assumed that everything requisite to the making of it was duly proved before it was made. But then comes sect. 11, which, I think, if more was needed, makes the adjudication conclusive on third persons that the act of bankruptcy on which it was founded was really committed. I confess it did at first seem to me unreasonable that a creditor who does not desire to dispute the adjudication itself should be put to the trouble and expense of taking proceedings to annul it. But in this case the very ground for sustaining the bill of sale would itself go to defeat the adjudication. On the whole, I am of opinion that the order of the Chief Judge must be discharged.

Thesiger, L.J.

THESIGER, L.J.:—

The question in dispute is as to the time to which the title of the trustee in the bankruptcy properly and legally relates back. If it relates back to the 31st of December, it is admitted that the title of the trustee is good as against the holder of the bill of sale, he having taken no apparent possession of the property until the 1st of January. I am of opinion that we are bound by the terms of the Act of 1869 to hold that the bankruptcy did commence on the 31st of December. The adjudication was made on the 3rd of January, and it was made upon a petition which stated that the debtor, being a trader, departed from his dwelling-house on the 31st of December with intent to defeat or delay his creditors.

That being the adjudication and the petition on which it was

founded, we are placed in this position by sects. 10 and 11 of the Act. By sect. 10 the adjudication is in "all legal proceedings," and therefore in a proceeding between the trustee and the holder of a bill of sale given by the bankrupt, to be conclusive evidence that the debtor was duly adjudged a bankrupt. We start, therefore, with this, that we are bound to hold conclusively that a "due" adjudication was made on the 3rd of January. It must, therefore, have been founded upon a proper act of bankruptcy. Then sect. 11 goes still further, and it is important to compare it with the provisions contained in the prior Bankruptcy Acts. Sects. 234 and 235 enabled third persons to dispute the act of bankruptcy upon giving notice of their intention so to do. That provision is swept away by the Act of 1869, and in language clear and distinct the Legislature has said by sect. 11 that "the bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt."

It has been suggested that this does not relate to outsiders. If it does not, it has not been pointed out to whom it does relate, nor how, if we are not to construe the words literally, we are to construe them. But the latter part of the section shews clearly that it must relate to outsiders, for it shews that it refers to any case of a dispute between the trustee and a person against whom there may be a claim on behalf of the bankrupt's estate. The section also in terms makes a distinction between the act of bankruptcy on which the adjudication is founded and any other act of bankruptcy to which it is attempted to carry back the trustee's title. In the first case, the trustee's title is to be deemed to relate back; in the other, it is to relate back upon proof of the commission of the act of bankruptcy. The Legislature, for the general convenience of the administration of the bankrupt's estate, has fixed a *datum* line for the commencement of the trustee's title—viz., the act of bankruptcy on which the adjudication is founded, leaving it open to the trustee to prove, if he can, earlier acts of bankruptcy. No doubt a certain amount of hardship will result from this construction. But the answer to that is, that it is open to any person aggrieved by the adjudication to apply to the

C. A. 1878 *Ex parte* LEAROYD. *In re* FOULDS.

Court to annul it. And there is this further answer, that in the administration of bankruptcy the interests of individual creditors have to bow to the interests of the general body of creditors, and we must, therefore, expect to find some cases of hardship.

Appeal allowed with costs.

Dec. 5. *Winslow*, Q.C., for the bill of sale holder, applied *ex parte* for leave to appeal to the House of Lords.

JAMES, L.J.:—The question is one of very great importance, as well as one of difficulty, though I cannot say that I feel much doubt about it. You may take leave to appeal, but the petition must be lodged within a month.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors for Appellants: *Bower & Cotton*, agents for *F. Jubb, Halifax.*

Solicitors for Respondent: *Layton & Jaques*, agents for *Holroyde & Smith, Halifax.*

## FINNEY *v.* GRICE.

M. R.
1878
Nov. 4.

[1875 F. 26a.]

*Will—"Household Furniture"—Leasehold House—Tenant's Fixtures.*

As a general rule, a bequest of "household furniture" will not pass the tenant's fixtures in a leasehold house occupied by the testator.

FURTHER CONSIDERATION.

Statement.

The action was for the administration of the estate of *Joseph Brindley*, deceased, who by his will, made in 1865, gave and bequeathed to his wife all his "household furniture, plate, linen, and china articles and things, except stock-in-trade, money, securities for money, books of account, and manuscripts; and also all my household consumable stores that may be within my dwelling-house at the time of my decease, for her own absolute use and benefit." And he devised and bequeathed his residuary real and personal estate, including leaseholds, to trustees in trust for sale.

At the time of his death the testator was residing in a leasehold house at *Eltham*, which contained numerous articles belonging to him of the class usually considered tenant's fixtures, such as gaseliers, gas-brackets, warming apparatus, slate shelving, and a slate sink standing on cantilevers fixed into the wall.

The house was sold by auction under an order of the Court in the action; but shortly after the sale the widow removed and sold the tenant's fixtures above mentioned, on the assumption that she was entitled to them under the gift of the testator's "furniture." An order was then made allowing the purchaser of the house the sum of £115 out of the testator's estate as compensation for the articles removed by the widow; but it was contended, on the part of the trustees and executors of the will, that this sum should be repaid by the widow, on the ground that the articles in question did not pass under the word "furniture."

Argument.

*Chitty*, Q.C., and *Phear*, for the trustees and executors.

*Romer*, for the widow:—

*Paton* v. *Sheppard* (1) is a distinct authority that, under a

(1) 10 Sim. 186.

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bequest of "household furniture," fixtures belonging to the testator in a leasehold house occupied by him will pass. And in *Kelly* v. *Powlet* (1), referred to in a note to that case (2), "household furniture" is said to comprise everything that contributes to the use or convenience of the householder, or ornament of the house. At all events, such articles as gaseliers and gas-brackets will pass.

[JESSEL, M.R., referred to *Birch* v. *Dawson* (3).]

*Ince*, Q.C., *Simmonds*, and *A. C. Cherry*, for other parties.

Judgment.

JESSEL, M.R. :—

I dissent most emphatically from the proposition that where the owner of a leasehold house containing tenant's fixtures bequeaths the house to *A.* and the "furniture" to *B.*, that entitles *B.* to remove the mantel-pieces, stoves, kitchen dressers and shelves, and articles of that kind.

In my opinion it is clear that whether you regard the ordinary use of language or the technicalities of the law relating to fixtures, such articles do not pass under the word "furniture."

The occupier of the house, as lessee, is as much entitled to the tenant's fixtures as to the house, but no further; though he has this right—the right during the term of taking the fixtures away or selling them to the freeholder; but after the term has expired, he is not entitled to take them, for they are no longer his property.

In no sense does the word "furniture" include such articles as I have mentioned.

I guard myself from saying that there may not be special circumstances in any particular case—and there were special circumstances in *Paton* v. *Sheppard* (4)—which would entitle the Court to say that the owner of the house and fixtures did intend the fixtures to pass under the word "furniture;" and I do not say but that the boundary line may sometimes be so fine that the Court may hold that articles which are, strictly speaking, tenant's fixtures, are so nearly like furniture that they will pass under the

(1) Amb. 605.
(2) 10 Sim. 192.
(3) 2 A. & E. 37.
(4) 10 Sim. 186.

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word "furniture;" but it may be stated as a general rule that the word "furniture" will not pass tenant's fixtures.

In this particular case, as there appear to be some articles included in the valuation to which the widow would be entitled as "furniture," and to save the expense of a reference to Chambers, I shall order the widow to repay one-half of the £115.

Solicitors: *Plaskitt*, agent for *F. Smoothy, Braintree; Cronin & Rivolta; Foss & Legg*, agents for *F. R. T. Bloxam, Eltham.*

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1878
*Nov. 6.*

## GENERAL FINANCE, MORTGAGE, AND DISCOUNT COMPANY *v.* LIBERATOR PERMANENT BENEFIT BUILDING SOCIETY.

[1878 G. 71.]

*Deed—Estoppel—Mortgage—Grant—Covenants for Title—Averment of Legal Estate.*

The covenants for title in a mortgage of a freehold estate, whether read in connection with the word "grant" or not, do not amount to that precise averment that the mortgagor is seised of the legal estate which is necessary to create an estoppel as against him and persons claiming under him.

*A.*, by deed, purported to grant a freehold estate to *B.* by way of mortgage. The deed contained no recitals, but there were the usual mortgagor's covenants for title, including a covenant that the mortgagor "had power to grant the premises in manner aforesaid."

The mortgage was accepted by *B.* on the faith of certain forged title deeds produced and handed to him by *A.* At the date of the mortgage *A.* had not the legal estate nor any interest whatever in the property. Subsequently, however, *A.* acquired the legal estate and mortgaged it to *C.*:—

*Held*, that, inasmuch as the mortgage to *B.* contained no precise averment that *A.* was seised of the legal estate, no estoppel had been created in favour of *B.* as against *C.*

Statement.

SPECIAL CASE, stated for the opinion of the Court under Rules of Court, 1875, Order XXXIV., rule 1.

The action had been brought by the Plaintiffs against the Defendants to recover possession of certain freehold lands in the parish of *Camberwell*, and also (by special leave) to recover possession of the title deeds relating thereto.

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Statement.

The facts, as stated in the special case, were to the following effect:—

By an indenture dated the 21st of December, 1872, the lands in question were conveyed to *John Woodbine White* in fee simple.

By an indenture dated the 23rd of December, 1872, *White* mortgaged the property to *Risdon, Templeton,* and *Clifford* in fee simple to secure £800 and interest.

By an indenture dated the 14th of May, 1873, and made between *Edward Downs* of the one part, and the Plaintiffs of the other part, *Downs* purported to grant and convey the same property to the Plaintiffs in fee simple, by way of mortgage to secure £800 and interest. This mortgage deed contained no recitals, but there were the usual mortgagor's covenants for title, including a covenant that the mortgagor "had full power to grant and convey the said premises in manner aforesaid."

Prior to the execution of this mortgage *Downs* produced to the Plaintiffs two documents purporting to be the title deeds under which he claimed to be the absolute owner in fee simple of the property; and these two deeds were, upon the execution of the mortgage, handed by *Downs* to the Plaintiffs, and were now in their possession.

It was, however, afterwards discovered that these deeds were forgeries, and that at the date of the mortgage of the 14th of May, 1873, *Downs* had not the legal estate, nor any interest whatever in the property in question.

By an indenture dated the 20th of May, 1873, and made between *Risdon, Templeton,* and *Clifford* of the first part, *White* of the second part, and *Downs* of the third part, the property was conveyed, by way of sale, to *Downs* in fee simple discharged from the mortgage of the 23rd of December, 1872; and then, by another indenture of the same date, and made between *Downs* of the one part, and the Defendants of the other part, *Downs* mortgaged the property to the Defendants to secure moneys which had been advanced by them to him to enable him to complete his purchase.

The Defendants had not at the time of such advance or mortgage any notice of the prior mortgage by *Downs* to the Plaintiffs.

By virtue of their mortgage the Defendants were now in possession of the property, and also of the genuine title deeds,

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consisting of the original conveyance to *White* of the 21st of December, 1872, the mortgage by him of the 23rd of December, 1872, and the conveyance by him and his mortgagees to *Downs* of the 20th of May, 1873.

The mortgage debts under both the Plaintiffs' and the Defendants' mortgages being still unpaid, the question arose which mortgage was entitled to priority.

On the one hand, the Plaintiffs contended that by virtue of their mortgage and the subsequent conveyance to *Downs* of the 20th of May, 1873, the legal estate was vested in them, and that they were accordingly entitled as mortgagees to the possession of the property and the genuine title deeds.

Statement.

On the other hand, the Defendants contended that by virtue of the title deeds in their hands and their mortgage deed they were seised of the legal estate, and were entitled to possession.

The following questions of law were accordingly submitted by both parties for the opinion of the Court:—

(1.) Whether the Defendants were entitled to the property in priority to the Plaintiffs in respect of the moneys due and secured by virtue of the mortgage of the 20th of May, 1873; and (2.) Whether the Defendants were bound to deliver up possession of the property and title deeds to the Plaintiffs.

*Chitty*, Q.C., and *Farwell*, for the Plaintiffs:—

Argument.

We claim to have a title by estoppel; that is to say, although at the time *Downs* executed his mortgage to us he had no legal estate, he—and all persons claiming under him—became, by virtue of that mortgage, estopped from denying that he had the legal estate; and the estoppel so created was "fed" by the legal estate which he afterwards acquired under the conveyance to him from *White* and his mortgagees, so that the legal estate thus became complete.

The doctrine of estoppel—which Lord *Coke*, in discussing it, describes as "an excellent and curious kinde of learning" (1)—rests, when applied to a "deed indented"—such as a deed of grant—upon a clear and precise averment of title; the question considered in most of the cases upon the subject being to what

(1) Butl. Co. Litt. 352 a.

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extent recitals constitute such an averment as will operate as an estoppel. It now appears to be settled law that a general recital will not operate as an estoppel, but that the recital of a particular fact will have that effect: *Bensley* v. *Burdon* (1); *Sugden's* Vendors and Purchasers (2); *Right* v. *Bucknell* (3); though in the former case Sir *John Leach* seems to have been of opinion that a simple conveyance by lease and release was in itself sufficient to create an estoppel.

The Defendants will probably rely on the recent case of *Heath* v. *Crealock* (4), where, on an ordinary conveyance to a purchaser in fee, a recital that the vendor was seised "or otherwise well and sufficiently entitled in fee simple," was held not to constitute that precise or unambiguous averment which the doctrine of estoppel requires. In the present case—which is that of a mortgage, not a simple conveyance—we admit we have no recital at all, but we have the usual mortgagor's absolute covenants for title; and we rely in particular upon the covenant that the mortgagor "has full power to grant and convey the said premises in manner aforesaid," which, we submit, is tantamount to an averment that the mortgagor is absolutely seised in fee, a recital of which fact would, according to Lord *Cairns'* judgment in *Heath* v. *Crealock*, be sufficient to create an estoppel.

[JESSEL, M.R.:—Can you produce any authority for the proposition that an estoppel can be created by covenant?]

We have not been able to find any direct decision upon the point in the books or in any of the cases on estoppel collected in *Dart's* Vendors and Purchasers (5); but there is authority that, in order to ascertain whether a deed contains a sufficient averment of title, you must look at the whole deed and not merely at one particular part of it.

In *Crofts* v. *Middleton* (6), Lord *Hatherley*, when Vice-Chancellor, said the question in such cases is whether there is, upon the whole deed, any distinct averment of the grantor's title, "either by recital or in any other way." It appears to be now well established that a "grant" or "release" alone is not such an averment, but

(1) 2 S. & S. 519; 8 L. J. (Ch.) 85.
(2) 14th Ed. p. 739, n.
(3) 2 B. & Ad. 278.
(4) Law Rep. 10 Ch. 22.
(5) 5th Ed. p. 810.
(6) 2 K. & J. 194.

that a "demise" is: *Crofts* v. *Middleton* (1). In *Butl. Co. Litt.* (2) it is stated that the word "grant," standing alone, does not imply a warranty, but that the word "demise," as importing a covenant for quiet enjoyment, does imply a warranty, and therefore operates as an estoppel. The word "grant" has, at all events, this effect—that a grantor cannot dispute with his grantee his own title to what he has assumed to convey: *Doe* v. *Horne* (3); and if, as in the present case, a grant is coupled with covenants for title, more especially a mortgagor's absolute covenants, it is difficult to see—reasoning by analogy—why that should be less capable of constituting a sufficient averment or warranty than a demise. A covenant or obligation involves statements which the covenantor is estopped from denying: *Vin.* Abr., "Estoppel" (4), referring to *Barwicke* v. *Gybson* (5). In *Goodtitle* v. *Bailey* (6), Lord *Mansfield* says, "If a man has made a solemn deed covenanting that another shall enjoy the premises, and likewise for further assurance, it shall never lie in his mouth to dispute the title of the party to whom he has so undertaken." And in *Bowman* v. *Taylor* (7), Justice *Taunton* lays it down as a principle "that where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted."

Surely, if *A.* conveys to *B.* for value, and covenants for title, this is, in effect, an assertion by *A.* that he has the property to sell: it is a representation which operates on an estoppel.

[JESSEL, M.R.:—There must be a distinct and particular statement of *A.'s* title. The doctrine of estoppel, as applied to a case of this kind, is not founded on representation.]

But here the covenant that the mortgagor has power to grant is absolute and unqualified, and when taken in conjunction with the grant necessarily implies, as we submit, a clear and distinct assertion that the grantor has the legal estate to grant.

*Davey*, Q.C., and *Chester*, for the Defendants, were not called upon.

(1) 2 K. & J. 194.
(2) 384 a, note.
(3) 3 Q. B. 766.
(4) P. 9; M. 8. XV.
(5) 3 Cro. Jac. 297.
(6) 2 Cowp. 597, 600.
(7) 2 A. & E. 278; 2 Sm. L. C. 7th Ed. p. 846.

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JESSEL, M.R.:—

It is a very unpleasant thing to have to decide a case of this kind without knowledge of the reasons for some of the distinctions which are established by the old cases; but fortunately, in this particular instance, I have modern authority which, in my opinion, is conclusive upon the subject, and therefore I am not going through those ancient decisions, to a portion of which only I have been referred, although there are a good many more which, I dare say, the counsel engaged in this case are well acquainted with.

The real question in this case arises upon the contents of a deed. A Mr. *Downs* went to the Plaintiffs with two forged deeds, purporting to shew his title to certain property, and borrowed some money from them upon a mortgage of that property. He afterwards got the Defendants to advance him the money wherewith to buy the property, and the Defendants unluckily did what no prudent mortgagees should ever do, that is, they allowed the then owner of the legal estate to convey to *Downs* and then took a mortgage direct from him. As I have said, no mortgagee should ever allow the legal estate to get into his mortgagor's possession.

However, the Defendants did so, and the mortgage to them being dated the same day as the conveyance to *Downs*, the result was that for a moment the legal estate was in *Downs*.

The Plaintiffs say that that was no fault of theirs; but the following point arises between two innocent parties who were in fact cheated; no fault can be shewn to exist as against one more than as against the other. The Plaintiffs say that by reason of something in the mortgage to them there was an estoppel as against *Downs* and the persons claiming under him, and that that estoppel became filled or supplied by the momentary conveyance to *Downs*, which, in other words, fed the estoppel and thereby vested the legal estate by estoppel in the Plaintiffs; and that is the question I have now to decide.

Now this question depends upon decision, that is to say, upon authority. The whole doctrine of estoppel of this kind, which is a fictitious statement treated as true, might have been founded in reason, but I am not sure that it was. There is another kind of estoppel—estoppel by representation—which is founded upon reason, and it is founded upon decision also. It is quite plain that

it is not every representation that will do for an estoppel, and it is not every statement that will do. In order to find out what sort of statement will do, you must have recourse to authority; and, as far as I am concerned, I shall treat the authorities as binding and conclusive, for I am not going to inquire how they came to be decided in the way they were: there they are.

The first case I am going to refer to is a very modern case, and so indeed is another. The first case is that of *Heath* v. *Crealock*, where the Lord Chancellor, Lord *Cairns*, says this (1): "Now, in my opinion, that argument" (that is, the argument as to estoppel) "was founded altogether upon a fallacy. There is no estoppel whatever in this case. The conveyances to the purchasers were innocent. They were ordinary conveyances by grant; the operative words of which, as is well known, would create no estoppel." It was then well known, but whether it was well known at all times is another question, because Sir *John Leach* had decided the contrary; but in 1874 it was well known, because the point had been considered long before; there had been a decision in 1831 by Lord *Tenterden*, who held the same view as Lord *Cairns*.

The Lord Chancellor goes on to say, "and the estoppel, if it arose at all, would arise by virtue of the first recital in the conveyance."

Now this shews that the grant, though it would amount in equity to a representation, does not amount in law to a representation that the man has a right to grant. It is very odd that it should be so, but it is so, and that is all that one can say about it. If a man chose for money to grant an estate to *A.*, or agreed to mortgage it to him, it would certainly have been held in equity that he represented he had an estate to sell or mortgage. But that is not so at law as regards estoppel.

His Lordship goes on, "The recital was in substance the ordinary one in such cases. It recited that *Stephens* was seised or otherwise well and sufficiently entitled to the property in question, free from incumbrances." What does "well and sufficiently entitled" mean? A man cannot be "well and sufficiently entitled" except he is the owner; but it is said that he is "well and sufficiently entitled" if he is equitable owner, and that is important.

(1) Law Rep. 10 Ch. 30.

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His Lordship then proceeds, "If the recital had been a recital simply that *Stephens* was seised, there might have been an estoppel, but the recital is one out of which no estoppel can arise, because it is not precise or unambiguous. It is a recital which, in substance, amounts to a statement that he had an estate either at law or in equity, and the fact that it states that the estate, whatever it was, was free from incumbrances, creates no estoppel for the purpose of making the legal estate pass."

So that his Lordship construes the rule as strictly as that, namely, that a representation that a man is entitled to an estate free from incumbrances is not a representation that he has the legal estate. "There is, therefore, no estoppel operating so as to convey the legal estate to the purchasers."

Then Lord Justice *James* says that he is of the same opinion. Lord Justice *Mellish* says, "I agree with what has been laid down by the Lord Chancellor, that in this case there is no estoppel as to the legal estate alleged to have passed to the purchasers."

So that there is modern decision to shew that, even in the case of recital, it must be a strict recital that the man has the legal estate; nothing less will do.

Then there is a case of *Crofts* v. *Middleton* (1), which was a decision by Vice-Chancellor *Wood*, who says that you must look at the deed to see—what? That there is the precise representation that the man has the legal estate. That is what you have to find from the deed—the precise representation.

To the same effect is the case of *Right* v. *Bucknell* (2), before Lord *Tenterden*, where he refers to a case of *Bensley* v. *Burdon*, which came before Sir *John Leach*, who decided—as it is now settled he was wrong in deciding—that a lease and release would operate as an estoppel without more, and that it does not matter whether the word is "release" or "grant." *Bensley* v. *Burdon* is, I find, reported on appeal in 8 L. J. (Ch.) 85, not in 5 Russ. Ch. Rep., as stated in the reporter's note to *Right* v. *Bucknell*. The Lord Chancellor *Lyndhurst*, it is there stated, affirmed Sir *John Leach's* judgment by holding that there was an estoppel, but put it upon this ground solely, that there was an allegation of a particular fact by which the party making it was concluded.

(1) 2 K. & J. 194. (2) 2 B. & Ad. 278.

What then does this deed convey? It has no recital at all. It is a common grant, which of course will not do, but the mortgagor thereby covenants with the mortgagee in the usual way, "that the mortgagor has full power to grant and convey the said premises in manner aforesaid;" and then there are other covenants which were not relied upon,—for instance that the mortgagor after default should quietly enjoy.

Now, it has been said that that covenant contains that precise statement which is necessary in order to support this kind of estoppel. In the first place, I am of opinion that there is no such precise statement in the covenant. The mortgagor has power to convey even if the legal estate is outstanding in a bare trustee. He can compel the trustee to come in and grant the estate, and in that way he really has the power to convey. He has power to call upon the trustee to convey to him and also to convey "in manner aforesaid." He has power to convey if he has the whole beneficial interest.

The words of the covenant can be fully complied with without his having a single atom of legal estate. He only covenants that he has the power to convey, and therefore it might be that he might have through the medium of the *Statute of Uses* a power only, and this without having any estate at all; or he might have a power under a will which would enable him to convey by bargain and sale irrespective of the *Statute of Uses*. Therefore, the assertion that he has a power to convey is not an assertion that he is seised in fee or that he has any legal estate whatever.

There are other cases which can be put which would undoubtedly comply with the words even if there had been a recital instead of there being merely a covenant. It appears to me therefore that, having regard to the decision of the Court of Appeal which I have mentioned, there is not in this case that precise, clear, and unambiguous statement that *Downs* was seised in fee or had the legal estate which is required by the law as settled by authority.

There is one other observation which I have to make upon the case, which is this. I am not prepared to decide that a covenant will do at all. As it is said in *Crofts* v. *Middleton* (1), you must

(1) 2 K. & J. 194.

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look to the effect of the deed. In the first place, no decided case has been produced in which it has been held that the covenant that a man has a thing shall be considered as equivalent to a positive statement that he has it; and therefore there is no authority in all the long line of cases which makes a covenant sufficient.

It has been attempted to argue the point upon grounds of principle and analogy, which I am afraid have very little to do with this case; but if you were to adopt the principle of *Crofts* v. *Middleton* (1), namely, that you must look to the whole of the deed to see what its effect is, the result would simply be this: the covenant is an agreement that if the mortgagor has not the power to convey the legal estate he will be liable in damages; it is an agreement that he shall be treated as having it, and so be liable to an action if the statement turns out to be untrue: that is what it means. The covenant has no other meaning, it is not a mere assertion that he has the legal estate, but an agreement really that if he has it not, he will pay for it. It is a bargain that he has the power to convey; but not an assertion that he has the estate; and so it does not appear to me to be at all clear that that would amount to that precise averment of a fact which is necessary in order to support the doctrine that a subsequent conveyance of the legal estate will, so to say, fill up the estoppel previously created.

The last remark I think it necessary to make is this—that I see no reason for extending the doctrine. It can have no operation except in the case of third parties who are innocent of fraud and who have become owners for value; and there can be no reason—as I intimated at the beginning of my judgment—that I am aware of, for preferring one innocent purchaser for value to another. As against the man himself or persons claiming without value, the purchaser or the mortgagee can recover without any recourse to estoppel at all; therefore, considering especially that the jurisdiction in equity and common law is now vested in every Court of Justice, so that no action for ejectment or, as it is now called, an action for the recovery of land, can be defeated for the want of the legal estate where the Plaintiff has the title to the possession, I think I ought not to attempt in any way to extend

(1) 2 K. & J. 194.

this doctrine by which falsehood is made to have the effect of truth. The doctrine appears no longer necessary in law; it appears no longer useful, and, in my opinion, should not be carried further than a Judge is obliged to carry it.

Under these circumstances I decide both questions put to me by the special case in favour of the Defendants.

Solicitors: *Boulton & Sons; H. G. Wright.*

M. R.
1878
GENERAL FINANCE, MORTGAGE, AND DISCOUNT COMPANY *v.* LIBERATOR PERMANENT BENEFIT BUILDING SOCIETY.

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## ROGERS *v.* MUTCH.

M. R.
1878
*Nov.* 11.

[1874 R. 13.]

*Will—Bequest to "Children of A. who shall attain twenty-one"—Separate Legacies—Time of ascertaining Class—After-born Children.*

Bequest of "the sum of £100 to each of the children of my niece *M.* who shall live to attain the age of twenty-one years."

The niece survived the testatrix, and was still living, but had not yet had any children:—

*Held*,—applying the rule that, under a gift of a certain sum to each of a class of objects at a future period, objects born after the testator's death cannot be admitted,—that no child the niece might have could take under the bequest.

### FURTHER CONSIDERATION.

Statement.

*Elizabeth Hill*, widow, by her will, dated the 3rd of June, 1873, bequeathed "the sum of £100 to each of the children of my niece *Eliza Mutch*, who shall live to attain the age of twenty-one years."

The testatrix died on the 31st of October, 1873.

*Eliza Mutch* was still living, and she and her husband were Defendants in this action, which was for the administration of the estate of the testatrix. Mrs. *Mutch* had not yet had any children. In distributing the estate the question arose whether any, and, if so, what amount should be set apart to answer the legacies to the "children" of Mrs. *Mutch*.

Argument.

*Locock Webb*, Q.C., and *Yate Lee*, for the Plaintiffs, the executors:—

The rule appears to be that, under a gift of a certain sum to each of a class of objects at a future period, no members of that

M. R. 1878 ROGERS v. MUTCH. Argument.

class born after the death of the testator can be admitted, otherwise the inconvenience would arise of having to postpone the distribution of the estate until it could be ascertained how many legacies of the given amount would be payable: *Ringrose* v. *Bramham* (1); *Mann* v. *Thompson* (2); *Storrs* v. *Benbow* (3); *Hawkins* on Wills (4). They also mentioned *Weld* v. *Bradbury* (5).

*Chitty*, Q.C., and *Jolliffe*, for the Defendants, Mr. and Mrs. *Mutch*.

Judgment.

JESSEL, M.R.:—

As I understand the rule, its object is simply one of convenience.

In the old case of *Ringrose* v. *Bramham*, the gift was of £50 to every child of *Joseph Ringrose* and *Christopher Rhodes* by their present wives who came of age, and the Master of the Rolls says this: "Here there are distinct legacies of £50 to each of the children, and therefore if I am to let in all the children of these two persons born at any future time, I must postpone the distribution of the testator's personal estate until the death of *Joseph Ringrose* and *Christopher Rhodes*, or their wives, for I can never divide the residue until I know how many legacies of £50 are payable." And he distinguishes the case of *Gilmore* v. *Severn* (6) by saying that in that case a gross sum of £350 was given to the children of *Jane Gilmore*, to be paid to them in equal shares at twenty-one, and that there was no inconvenience in postponing the vesting of those shares until some one of them attained that age, so as to let in the children born in the meantime, because there was nothing to do but to set apart the sum of £350, and the residue of the testator's personal estate might be immediately divided. So that the rule is a rule of convenience; unless you adopt it you cannot divide the estate.

In *Ringrose* v. *Bramham* there were children living at the death of the testator, but the same rule applies, where, as in the present case, there are no children living at the testator's death. If, in such a case, you are to let in children born after the death,

(1) 2 Cox, 384.
(2) Kay, 638.
(3) 2 My. & K. 46; 3 D. M. & G. 390.
(4) Page 73.
(5) 2 Vern. 705.
(6) 1 Bro. C. C. 582.

the estate is no more divisible in the one case than in the other; and so Lord *Hatherley*, when Vice-Chancellor, points out in *Mann* v. *Thompson* (1). He says this (2): "The next case is not a bequest of a sum to be divided among a class, but a gift of a certain sum to each individual of the class, where no time is fixed by the will at which the class is to be ascertained. I do not find any decided case in which the point has arisen, which occurs here with regard to children, who were neither *in esse* at the date of the will, nor at the testator's death." He then refers to *Ringrose* v. *Bramham* (3), and says: "The reason which he (the Master of the Rolls) gave for excluding them (the afterborn children), seems to be very sound, namely, the extreme inconvenience of postponing the distribution of the testator's personal estate until all the children who might be born should be ascertained, which would not happen until the death of their respective parents."

The actual point in this case did not arise in *Ringrose* v. *Bramham*, but still the *ratio decidendi* clearly applies.

[His Lordship then read several other passages from the Vice-Chancellor's judgment (4), and continued:—] It appears, therefore, that the Vice-Chancellor approves of the decision in *Ringrose* v. *Bramham*, and also of the reason for that decision, and would have applied it to the case before him but that the language of the will was sufficient to shew the testator contemplated those children only who should be living at his death.

Then I find the rule is laid down in Mr. *Hawkins'* well-known and valuable book, where he says (5): "The rule which admits objects born after the testator's death and before the period of distribution, to share in the bequest, only applies where the total amount of the gift is independent of the number of objects among whom it is to be divided, and is therefore not increased by the construction adopted. But a gift of a certain sum to each of a class of objects at a future period is confined to those living at the testator's death." He then illustrates the rule by referring to the two authorities I have mentioned, and proceeds: "The reason given is, that in the latter case, if afterborn children were admitted,

(1) Kay, 638.
(2) Ibid. 642.
(3) 2 Cox, 384.
(4) Kay, 643, 644.
(5) Page 73.

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the distribution of the personal estate of the testator would have to be postponed till it could be ascertained how many legacies of the given amount would be payable." So he obviously takes the same view as has been taken by the authorities, namely, that no children born after the testator's death can be admitted unless the total amount of the gift is independent of the number of objects.

So I apply the rule in this case, and hold that no child Mrs. *Mutch* may have can take under this bequest.

Solicitors: *T. H. Devonshire; Chapple, Welch, & Chapple.*

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M. R. 1878 *Nov.* 18.

## SIMPSON *v.* DENNY.

[1876 S. 230.]

*Partition Acts*, 1868 *and* 1876—*Partition Action—Trustees representing Beneficiaries—Rules of Court*, 1875, *Order* XVI., *r.* 7.

13 Ch D. 643.

Order XVI., rule 7, of the Rules of Court, 1875, enabling trustees to represent their beneficiaries in an action, applies to an action under the *Partition Acts*, 1868 and 1876.

Statement.

THIS was a partition action under the *Partition Acts*, 1868 and 1876.

An order had been made directing an inquiry who were the persons interested in or entitled to the property, and in what shares; and in answer to the inquiry the Chief Clerk's certificate had found (amongst other things) that one-seventh of the property was vested in the devisees in trust of the real estate of one *George Denny*, but the certificate did not state who were the parties beneficially interested in such one-seventh.

*Denny's* trustees had obtained liberty to attend the proceedings.

It was now proposed—on further consideration—to have the property sold and the proceeds divided according to the Chief Clerk's finding.

Argument.

*B. B. Rogers*, for the Plaintiff, referring to sect. 9 of the *Partition Act*, 1868,—under which the Court may direct such inquiries as to the "persons interested," and other matters, "as it thinks

necessary or proper with a view to an order for partition or sale being made on further consideration,"—submitted that Order XVI., rule 7, of Rules of Court, 1875, applied to an action under the Partition Acts; and therefore that *Denny's* trustees might, for the purposes of the action, be considered as sufficiently representing the parties beneficially interested under his will, so as to render a further inquiry as to such parties unnecessary.

M. R. 1878 SIMPSON v. DENNY. Argument.

*Macnaghten*, and *L. Field*, for other parties.

JESSEL, M.R., in making an order for sale and division of the proceeds as proposed, said that Order XVI., rule 7, applied to actions under the Partition Acts, and that the trustees might be treated as sufficiently representing the beneficiaries.

Judgment.

Solicitors: *Tilleard, Godden, & Holme*, agents for *E. P. Simpson, Norwich; F. W. Denny; Field, Roscoe, & Co.*

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## *In re* GARDNER'S TRUSTS.

M. R. 1878 *Nov.* 23.

*Practice—Appointment of New Trustees—Vesting Order—Lunatic Trustee out of Jurisdiction—Order in Lunacy as well as in Chancery.*

A petition for the appointment of new trustees and for a vesting order, where the existing sole trustee is of unsound mind and out of the jurisdiction, need not be presented in Lunacy as well as in Chancery.

THIS was a petition under the Trustee Acts for the appointment of new trustees of a will, and for a vesting order as to copyholds the legal estate in which was outstanding in the customary heir of the last surviving trustee.

Statement.

The heir was of unsound mind and out of the jurisdiction.

*Levett*, for the Petitioner:—

Argument.

The question is, whether the vesting order can be made in Chancery alone, under sect. 9 of the *Trustee Act*, 1850, the trustee being out of the jurisdiction; or whether, inasmuch as he is of unsound mind, the petition should not be intituled and presented,

M. R. 1878 *In re* GARDNER'S TRUSTS. Judgment.

and the order made, in Lunacy as well as in Chancery: *In re Mason* (1).

JESSEL, M.R.:—

The only point decided in *In re Mason* was, that in the case of a lunatic trustee you should intitule your petition in Lunacy as well as in Chancery under the 3rd section of the Act. The Court of Appeal, however, in directing the petition to be so intituled do not appear to have given any reason for the direction. The 9th section of the Act says that when the trustee is out of the jurisdiction the Court of Chancery may make a vesting order; and the 3rd section says that when the trustee is a lunatic the Judges in lunacy may make a vesting order. When you read the two sections together they evidently mean this, that when a lunatic trustee is within the jurisdiction the Judges in lunacy should make the order, but that when he is out of the jurisdiction the Court of Chancery—now the Chancery Division—may alone make the order, just as in the case of any other trustee out of the jurisdiction.

There will, therefore, be the usual vesting order.

Solicitors: *Phillips & Son.*

(1) Law Rep. 10 Ch. 273.

## NOYES *v.* CRAWLEY.

V.-C. M.

1878

Nov. 5.

[1878 N. 42.]

*Demurrer—Statute of Limitations—Partnership Transactions.*

In 1858 the Plaintiff and Defendant entered into partnership transactions which came to a final termination in 1861, when the Defendant admitted that £787 was due to the Plaintiff, but he never subsequently made any admission of the debt, or promise to pay. The Plaintiff brought an action for an account of the partnership dealings:—

*Held*, that the *Statute of Limitations* could be set up on demurrer; and was a good defence to a claim for partnership accounts.

*Miller* v. *Miller* (1) dissented from.

### DEMURRER.

Statement.

This action was brought by *Thomas H. Noyes*, formerly an official in a Government office, against the Defendant, *G. B. Crawley*, formerly a solicitor, but since engaged as a contractor of works in various parts of the continent. The claim stated as follows:—

In the year 1858 the Defendant persuaded the Plaintiff to join him in taking a lease of certain mining property in *Glamorganshire*, for the purpose of working and developing the ironstone and iron ore for their mutual benefit. The lease was executed in August, 1858, and thereby the Plaintiff and Defendant became entitled to two-thirds of the mining property in question, the other third being in the possession of two persons named *Jones* and *Christian*. It was contemplated and agreed, at the time of the lease to the Plaintiff and Defendant, that a large sum of money should be advanced by the Plaintiff for the expenses of carrying on the works, and that money was so advanced to a considerable amount by the Plaintiff, and lodged in a bank. The works were carried on by and under the sole direction of the Defendant, and with apparent activity, until the month of November, 1860, the Plaintiff up to that time having the greatest reliance in his integrity; and the Defendant had in the interval entered into treaty on behalf of the Plaintiff and himself for the purchase, or for a lease, of another ironstone mine. In the month of

(1) Law Rep. 8 Eq. 499.

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November, 1860, the Defendant suddenly abandoned the mining works and left *England*, deeply involved in liabilities arising from speculations in which he had engaged, and he had ever since, except at occasional intervals (when he had come to *England* for a few days without the Plaintiff's knowledge of his whereabouts), resided on the continent and in *America*, where he had followed the business of a contractor of works, having ceased to take out his certificate as a solicitor. After the Defendant had left *England* the Plaintiff discovered that he had greatly mismanaged the concern, and had left him in ignorance of the position and liabilities of the mine and works; that he had violated his promise as to drawing cheques, and had drawn out of the bank the whole of the Plaintiff's capital and had appropriated it to his own use, and had not left one shilling to enable the Plaintiff to carry on the works or to meet the dead rent of £200 a year payable for the mine, or any other liabilities in respect of the undertaking. The Plaintiff, with a view to save the property, was obliged to raise and pay the rent for a considerable time, but being unable to continue to pay the same, the landlord entered into possession and the lease became forfeited; and the Defendant, having failed to carry out the arrangement entered into for purchasing the interests of *Jones* and *Christian* in the other third part of the mine, left the Plaintiff exposed to proceedings at the suit of *Jones*, who, after the Defendant had left the country, sued the Plaintiff and obtained judgment against him. The Plaintiff never received from the Defendant any share whatever of the profits realized by him from the mine during the period of his management, and when applied to on the subject in the year 1861, shortly after he had quitted *England*, the Defendant admitted that he had a balance in hand (amounting on his own shewing to £787) which he ought to have paid over to the Plaintiff, and stated that he had lent the amount to a third party, by whom he expected to be repaid in the course of a month, when he would hand it over to the Plaintiff; but the Defendant, notwithstanding the said admission and promise, had never since paid the Plaintiff the said balance, or any sum whatsoever on account of the partnership. The Plaintiff had repeatedly applied to the Defendant to enter into an account and settlement with him in respect of the partnership,

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but the Defendant had not only refused to render any account whatever, but had absolutely repudiated the Plaintiff's claim in every respect. The Plaintiff had sustained considerable loss and injury by reason of the Defendant's conduct, and the Plaintiff claimed to have an account of all dealings and transactions, including the partnership dealings between the Plaintiff and Defendant, and to have the partnership wound up, and payment of such sum as should be found due on the account.

The Defendant demurred to the Plaintiffs claim, alleging that the same was bad in law and in equity, on the ground that such cause or causes of action (if any) as were alleged did not accrue within six years before the commencement of this action, and that the same were barred as well by the *Statute of Limitations* as also by such lapse of time as disentitled the Plaintiff to any equitable relief, and on other grounds sufficient in law and in equity to sustain this demurrer.

Argument.

*Bristowe*, Q.C., and *Hadley*, in support of the demurrer:—

The *Statute of Limitations* is a bar to the Plaintiff's claim in this action; but even if the defence of the statute could not be raised, still the transactions between the Plaintiff and Defendant terminated so many years ago, that the Court will treat the claim as a stale demand. The partnership was finally concluded in 1861, and a sum of money was stated to be due at that time, but there has been no subsequent admission of the debt in writing, or promise to pay, which would take the case out of the operation of the statute.

*Bond Coxe*, for the Plaintiff:—

This case is concluded by authority both as to the mode of pleading the *Statute of Limitations* (21 Jac. 1, c. 26), and as to the application of that statute to any action for partnership accounts. Before the *Common Law Procedure Act*, it was settled at law that the statute should be pleaded by way of defence and not by way of demurrer, as the Plaintiff might, in his replication, bring himself within the exceptions of the statute by shewing, as an issue of fact, that the Defendant had made a part payment, or given an unqualified promise to pay, or an acknowledgment of the debt in

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writing, or was absent beyond the seas during the currency of the six years. Since that Act, the same rule of pleading has been recognised and enforced by the Court of Queen's Bench in the recent case of *Wakelee* v. *Davis* (1).

No doubt in the case of *Dawkins* v. *Lord Penrhyn* (2), which was affirmed by the Court of Appeal, the *Statute of Limitations* as to real actions (3 & 4 Will. 4, c. 27) was allowed to be raised by demurrer even *ore tenus;* but in that case the obvious distinction which exists between personal and real actions was taken. In the former, the remedy only is taken away, while the right remains; and in the latter both the right and the remedy are gone—the title itself being extinguished at the expiration of twenty years; and the section of the Act limiting actions for rent within six years is only, in effect, a re-enactment of the statute of *James* as to arrears of rent, or rather, an extension of the subjects enumerated in that statute to arrears of rent, which, when accrued, assume the nature of a personal demand, arising from a covenant in the lease, use and occupation, or other personal liability in the absence of a distress. But even assuming that, in point of pleading, it is competent to plead the bar of the statute by demurrer, instead of by way of plea or defence, it has been held to be inapplicable to an action for partnership accounts, on the ground that such an action is not, in its true construction, a simple action for recovery of a debt—even upon a mercantile account—where the demand is only on one side, as between a trader and his customer in the ordinary course of business; but it is an action in which there are mutual demands, and in which the Plaintiff may not only not recover anything from the Defendant, but may, on the result of the accounts, have something to pay to the Defendant: *Miller* v. *Miller* (3). Moreover, in this case the statement of claim, which, for the purposes of the demurrer, stands admitted as to every allegation in it, discloses circumstances which, besides the absence of the Defendant beyond the seas, except at intervals secret and unknown to the Plaintiff, shew such gross abuse of confidence and fraudulent conduct on the part of the Defendant, as to make no lapse of time a bar to the action.

(1) 25 W. R. 60. (2) 6 Ch. D. 318.

(3) Law Rep. 8 Eq. 499.

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*Bristowe*, in reply:—

The case of *Dawkins* v. *Lord Penrhyn* (1) is conclusive as to our right to raise the defence of the statute upon demurrer, but the question was settled before that case by Lord *Eldon* in *Foster* v. *Hodgson* (2), and by Sir *L. Shadwell* in *Hoare* v. *Peck* (3) and in *Prance* v. *Sympson* (4). As to the statute not running in the case of a partnership, no decision but that of *Miller* v. *Miller* (5) can be found in favour of such an argument, and great doubt is thrown upon that case by Mr. Justice *Lindley* (6); and a similar question was decided the other way in *Knox* v. *Gye* (7).

Judgment.

MALINS, V.C.:—

From the allegations in this bill it appears that in the year 1858 the Plaintiff and Defendant entered into an adventure for the purchase of a mine, which I am bound to treat as a partnership undertaking. Then it appears that difficulties arose between them, and all the dealings and transactions of partnership were discontinued in 1860, and finally came to an end in 1861, after which the landlord entered into possession for non-payment of rent, and the lease was forfeited.

The allegations in the bill, therefore, prove these things: a partnership did exist between the Plaintiff and Defendant, but terminated in the year 1860. There was an account rendered to the Plaintiff in the year 1861, which shewed a balance in favour of the Plaintiff of £787, and upon the allegations in this bill nothing can be more clear than that the Plaintiff in the year 1861 would have been entitled in an action at law, which was the only mode at that time for recovering such sums as this, on an account stated, to recover that £787. Now, the £787 being due in 1861, in order to take the case out of the *Statute of Limitations*, the Plaintiff is bound to allege, and would have been bound to prove at the hearing of the cause, if it had gone to a hearing, either a subsequent promise to pay, and in writing, or part payment, or

(1) 6 Ch. D. 318.
(2) 19 Ves. 180.
(3) 6 Sim. 51.
(4) Kay, 678.
(5) Law Rep. 6 Eq. 499.
(6) Lindl. on Partnership, 4th Ed. p. 966.
(7) Law Rep. 5 H. L. 656.

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something to take it out of the *Statute of Limitations*. There is no allegation of that.

Consequently, here is a case in which all dealings and transactions between the parties ceased eighteen years ago. An account was stated seventeen years ago, in respect of which there never has been any payment or any subsequent promise to pay. Now, therefore, what can be more clear than that this is a case in which the statute is an absolute bar to the demand?

Then I have had this argument—assuming the *Statute of Limitations* to be a bar to the demand—it cannot be taken advantage of by demurrer. Now, that the *Statute of Limitations* can be taken advantage of by demurrer seems to me to be about one of the plainest things that can possibly be. Because a demurrer means simply this: "I admit all you say by your bill or statement of claim, and, admitting all that, you are not entitled to recover. Therefore this Defendant says: I admit that I was in partnership with you, I admit that I did render an account which entitled you to recover £787 in 1861, but, admitting all you say, it appears by your own statement that that promise was made seventeen years ago.

Then comes the statute which says that no action can be brought except within six years after the cause of action accrued. Therefore, on the face of the pleadings, it appears that the Plaintiff has no right, and consequently it necessarily follows that that can be taken advantage of by demurrer.

It was settled, long before the case of *Dawkins* v. *Lord Penrhyn* (1), that the *Statute of Limitations* can be taken advantage of by demurrer. The decisions of Lord *Eldon* in the case of *Foster* v. *Hodgson* (2), and of Sir *Lancelot Shadwell* in *Hoare* v. *Peck* (3), are conclusive that even before that case in this Court the *Statute of Limitations* was a good ground of demurrer to a claim when on the face of the bill it appeared that the right accrued more than six years before it was filed.

Then this question came before me in *Dawkins* v. *Lord Penrhyn*, where first of all there was a fatal bar according to my judgment, which was affirmed by the Court of Appeal, because the Plaintiff claimed under an entail which had been barred. But then came

(1) 6 Ch. D. 318. (2) 19 Ves. 180. (3) 6 Sim. 51.

the point that, even supposing the estate tail was not barred, the right had accrued to the late Colonel *Dawkins*, the father of the present colonel, twenty-five years before the action was brought. Therefore, to my mind, it was perfectly clear that the lapse of twenty-five years was a bar to the right, because the statute says that no entry shall be made, which also means that no action shall be brought—no action of ejectment in this Court or any other, except within twenty years after the right accrued. There the right had accrued twenty-five years before. Then the only point was, could the statute be taken advantage of by way of demurrer, because in that case they demurred? The new rules say you must state one cause of demurrer, but, having stated one cause of demurrer, you may avail yourself of any other ground of defence by way of demurrer; and therefore, as the *Statute of Limitations* was not mentioned in the demurrer, I had there to consider the question whether it could be taken advantage of as another ground of demurrer, it not having been put forward as the ground, or one of the grounds in the demurrer itself. I decided that it could be, and that decision was affirmed by the Court of Appeal. It is therefore perfectly settled in this Court that you can take advantage of the *Statute of Limitations* by way of defence, by demurrer.

Now, what is there alleged against this? There are only two cases cited; one is the case of *Miller* v. *Miller* (1), decided by Vice-Chancellor *Stuart*, which Mr. *Bond Coxe* cited as a general authority, that, between persons who have been partners, where there has once been a partnership, and the executor of one partner brings a bill for an account against the other after any lapse of time whatever, the statute cannot be taken advantage of. I cannot think that Sir *John Stuart*, with his great learning and experience, could ever have intended to decide in such a manner. On the contrary, I believe the decision must have proceeded on the ground that in that case the parties had executed a deed by which all the partnership property was assigned on trust to pay the creditors, and afterwards to divide what remained between them. There, a trust being created, nothing short of twenty years could be a bar to that trust. I think it must have proceeded on that ground, not on the general principle that as between partners,

(1) Law Rep. 6 Eq. 499.

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no lapse of time will be a bar to an action. If Sir *J. Stuart* did decide that, I can only say I entirely dissent from the decision, as every other case has dissented from it, and it is certainly overruled by the decision of the House of Lords in *Knox* v. *Gye* (1), which decided the broad point that where a bill for an account is filed by the executors of a deceased partner against the surviving partner, after the lapse of more than six years, although the business, which in that case was the business of a theatre, was carried on by the surviving partner during the six years, the *Statute of Limitations* is a final bar to such a claim; and that is greatly to the benefit of society, because it is of the utmost importance that time should put an end to all disputes.

With regard to the observation in the short report of the decision of the Court of Queen's Bench in *Wakelee* v. *Davis* (2), their attention does not seem to have been called to the authorities in this Court that have existed since 1776, namely, the decision of Lord *Eldon*, which I have referred to, and that of Sir *Lancelot Shadwell*. But the Lord Chief Justice says, "The cause of action remains, although the remedy may be suspended." I do not agree with that. The cause of action does not remain, because the statute says that no action shall be brought, and if there is no action, why does it remain in one case more than another? No entry is to be made in one case and no action in the other. The thing is gone, there is no remedy whatever. Then his Lordship says "the Defendant must plead the statute." That observation can have no force here, because he does not plead. It is not necessary to plead, because there is an authority settled now, that where you are entitled to take advantage of the statute you may do it by demurrer instead of by plea. Therefore that observation does not apply, and I am bound to say that the case of *Wakelee* v. *Davis* is an authority which I cannot understand after the decision of the Court of Appeal, which is so utterly inconsistent with it, and which is a subsequent decision. I think *Wakelee* v. *Davis* must be considered to be overruled by that authority.

Therefore, on every principle, as well as authority, I am bound to come to the conclusion, which I do with the most entire satisfaction, that the *Statute of Limitations* is a bar to such a claim as

(1) Law Rep. 5 H. L. 656. (2) 25 W. R. 60.

this; and that no party can maintain an action against a person who has been in partnership with him after the lapse of six years from the determination of the partnership, unless there has been something in the interval to bind the parties. I entirely agree with the law as laid down by Mr. Justice *Lindley*, in the passage to which Mr. *Bristowe* has referred me. Mr. Justice *Lindley* says (1): "So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the statute has, it is conceived, no application at all; but as soon as a partnership is dissolved" (which it was here in 1860), "or there is any exclusion of one partner by the others, the case is very different, and the statute begins to run." He then says: "This has been decided by the House of Lords in *Knox* v. *Gye* (2), in which a surviving partner relied on the statute as a defence to a suit for an account instituted by the executor of a deceased partner. The deceased partner had died more than six years before the filing of the bill, and the right of his executor had never been recognised. The surviving partner, however, had continued the partnership business and had got in outstanding assets within six years. The Vice-Chancellor *Wood* held that the statute was not a bar to the suit; but the decision was reversed by Lord *Chelmsford* on appeal, and the House of Lords affirmed Lord *Chelmsford's* decision." And I am very glad they did, for I think it is very greatly to the interest of society that the *Statute of Limitations* should be applied to every case where it can with fairness be applied.

Then, with regard to the case of *Miller* v. *Miller* (3), Mr. Justice *Lindley* says this: "*Miller* v. *Miller* is hardly consistent with this, unless on the ground that there was no dissolution." Here I have a case in which, beyond all question, on the allegations in the bill, there was a dissolution, or a termination, which is the same thing. The parties had dealings and transactions, but when the landlord put an end to the lease in 1860 all operations ceased.

The demurrer, therefore, must be allowed in the usual way, with costs, which will give the Defendant the whole costs of the action.

(1) 4th Ed. p. 966.
(2) Law Rep. 5 H. L. 656.
(3) Law Rep. 8 Eq. 499.

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*Bond Coxe* asked for leave to amend, and observed that his Lordship had not referred to what might be called the abuse of confidence and the allegations of fraud.

MALINS, V.C. :—I shall certainly not give leave to amend. As to the allegations of abuse of confidence and fraud, I do not consider there is any fraud. The circumstances all resolve themselves into partnership dealings and transactions. Abuse of confidence is so frequent in partnership matters, that it would indeed be lamentable if the Court allowed such an exception as that an action might be brought after six years where there was a breach of confidence.

Solicitor for Plaintiff: *C. A. Emmet.*
Solicitors for Defendant: *Randall & Angier.*

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V.-C. M. 1878 *Nov.* 9.

## *In re* JONES. JONES *v.* CALESS.

[1877 J. 52.]

*Administration Action—Costs—Lapsed Share.*

The cases in which a lapsed share of real or personal estate will be the primary fund for payment of costs of administration, discussed.
*Scott* v. *Cumberland* (1) and *Gowan* v. *Broughton* (2) explained.

Statement.

*WILLIAM JONES*, of *Ratley*, farmer, by his will, dated in 1871, gave all his estate in lands at *Ratley* to the use of his brother *Thomas Jones*, subject to all mortgages charged thereon, and also charged with a sum of £4000; and he bequeathed to trustees all his personal estate and effects upon trust, after payment of his debts, funeral and testamentary expenses, for persons therein named.

The gift of the lands at *Ratley* lapsed by the death of the devisee in the lifetime of the testator, and the question arose how the costs of the suit were to be paid, whether they ought to come out of the lapsed share or out of the residuary personal estate.

(1) Law Rep. 18 Eq. 578. (2) Law Rep. 19 Eq. 77.

*Tweedy*, for the Plaintiff.

*Henderson*, for the heir-at-law:—

Argument.

In *Scott* v. *Cumberland* (1) a lapsed share of real estate was made to bear the costs in priority to personal estate effectually disposed of, but in this case the testator has directed that the personal estate shall bear his testamentary expenses, which include these costs: *Eyre* v. *Marsden* (2).

*Bardswell*, for the next of kin:—

*Scott* v. *Cumberland* lays down a rule of law which applies to this case, and the lapsed realty ought to bear the costs.

In *Gowan* v. *Broughton* (3) your Lordship applied the rule laid down in *Scott* v. *Cumberland* to a lapsed share of residuary estate, and held that such lapsed share was the primary fund for payment of costs.

The Master of the Rolls in *Trethewen* v. *Helyar* (4), and Vice-Chancellor *Bacon* in *Fenton* v. *Wills* (5), dissented from your Lordship's opinion in *Gowan* v. *Broughton*, but *Scott* v. *Cumberland* has never been dissented from.

*Cozens-Hardy*, for parties in the same interest.

MALINS, V.C.:—

Judgment.

No one can doubt that the residuary personal estate is primarily the fund for payment of the costs of administration, and all that I intended to decide in *Gowan* v. *Broughton* was, that where the residuary personalty is given to a person who dies in the life of the testator, such personalty is no less the primary fund for payment of the costs than it would have been if the legatee had survived. [His Lordship then referred to the cases of *Trethewen* v. *Helyar* and *Fenton* v. *Wills*, and pointed out that the decision in those cases was in accordance with his decisions in the cases before him.]

But in this case the testator has directed that the personalty

(1) Law Rep. 18 Eq. 578.
(2) 4 My. & Cr. 231.
(3) Law Rep. 19 Eq. 77.
(4) 4 Ch. D. 53.
(5) 7 Ch. D. 33.

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shall remain the primary fund for payment of testamentary expenses, which includes general costs of suit, and they must therefore be paid out of the residuary personalty in priority to the lapsed devise of real estate.

Solicitors: *Glynes, Son, & Church; Burton, Yeates, & Hart; Sharpe, Parkers, & Co.*

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V.-C. M. 1878 *Nov.* 4.

## *In re* HERNE BAY WATERWORKS COMPANY.

*Petition to wind up by Debenture Holders—Powers under the Act.*

An unregistered company, incorporated by Act of Parliament, borrowed money under the powers of their Act upon debentures, and the debenture holders, not being able to get payment of their principal or interest, obtained the appointment of a receiver, but the profits of the concern not being sufficient to keep down the interest upon the debentures, the debenture holders presented a petition for winding up the company, and for sale of the concern:—

*Held*, that the only rights the debenture holders had under the Act of Parliament were the appointment of a receiver and priority over other debtors; and not being in the position of ordinary mortgagees, they could have no winding up or sale of the undertaking.

Petition dismissed.

Statement.

THIS was a petition to wind up the *Herne Bay Waterworks Company*, which was an unregistered company incorporated by Act of Parliament in 1867. By this Act, with which the *Companies Clauses Consolidation Act*, 1845, was incorporated, it was provided by the 11th section that the company should be at liberty to borrow on mortgage any sum not exceeding £1200. By the 12th section it was enacted that the mortgagees of the said company might enforce payment of the arrears of interest or principal, or principal and interest due on their mortgages by the appointment of a receiver; and by the 13th section it was enacted that all moneys to be borrowed on mortgage under the Act from the time when the said moneys should be advanced, and the interest for the time being due thereon, should have priority against the company, and all the property from time to time of the company, over all other claims on account of

any debts to be incurred or engagements to be entered into by them. The whole of the capital was raised, and in September, 1869, the company borrowed from the Petitioners the sum of £1200 at 6 per cent. per annum, on mortgage of their undertaking. The mortgages were in the form prescribed by the *Companies Clauses Consolidation Act*, 1845. The company failed to pay the interest due in respect of the mortgage, and on the 7th of May, 1872, a bill was filed by the Petitioners against the company for an account of what was due on their mortgage, and for a decree for payment of the amount, and the appointment of a receiver. On the 20th of July, 1872, the case came on before the Master of the Rolls, who appointed *J. B. Turner* the receiver, and on the 27th of July, 1872, an account was ordered to be taken and inquiries made in respect of charges and priorities on the undertaking. On the 16th of June, 1875, the receiver passed his account, when it appeared there were no funds in hand out of which the principal and interest due to the Petitioners could be paid, but there was a debt due to the receiver for moneys paid by him in respect of the works. On the 18th of March, 1878, there was due to the Petitioners for principal and interest £1745, without including a considerable sum for costs, and this sum was still due and owing to the Petitioners.

On the 7th of November, 1877, the Petitioners entered into an agreement to sell their interest in the undertaking to *Robert Sankey* and *Frederick Flint* for the sum of £1900, and to obtain the sanction of the Court to a foreclosure order, but the Petitioners were advised that no decree or order for foreclosure could be obtained, and that in order to realize their security by sale of the undertaking it was necessary to wind up the company. To carry out this arrangement the present petition was presented for an order to wind up the company, for the appointment of a liquidator, and for sale and transfer of the undertaking. It was in evidence that the company were at present unable to provide a proper and sufficient supply of water to the district of *Herne Bay*, but that the works might be improved and made capable of effecting all that was requisite by the outlay of about £1000, and that the intended purchasers would be willing to restore the works, and to place the undertaking on a proper footing.

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Argument.

*Glasse*, Q.C., and *B. Druce*, in support of the petition:—

This company is now in so hopeless a state that it is impossible for them to carry on the undertaking, or to supply the district of *Herne Bay* with the requisite quantity of water. The Petitioners are unable to obtain repayment of their money, and the receiver is obliged to apply all the tolls and profits in keeping up the works, consequently there is nothing left for the Petitioners. The only prospect, therefore, for the benefit of all parties is that the undertaking should be wound up, and the Petitioners would then be able to effect a sale of the property to persons who are now willing to give £1900, and to carry on the works so that they may become profitable. The law is laid down by the case of *In re Exmouth Docks Company* (1), that where it is shewn that there is no other process by which the difficulties of a company can be overcome, then there must be a winding-up of the concern. In that case a receiver had not been appointed, and the Court declined to wind up the company until a receiver had been appointed and it had been found that he had failed to obtain payment. Here a receiver has been appointed, and he has failed to obtain funds for paying off the mortgage. In the case of *In re Bradford Navigation Company* (2), the Court ordered a canal company to be wound up where it was found that the company could not be successfully carried on; and a similar order was made in *In re Wey and Arun Junction Canal Company* (3), where the canal was being worked at a loss, and in *In re Basingstoke Canal Company* (4). It may be that it will be necessary to obtain an Act of Parliament for the purpose of selling the undertaking, but without the sanction of the Court the company have no power to spend money in applying for an Act.

*Higgins*, Q.C., and *Millar*, for the company, opposed the petition:—

The first question is a mere matter of law, and we contend that the Court cannot make an order to wind up a company upon a petition by debenture holders, who are not the persons to present such a petition within the meaning of the winding-up Acts.

(1) Law Rep. 17 Eq. 181.
(2) Ibid. 10 Eq. 331.
(3) Law Rep. 4 Eq. 197.
(4) 14 W. R. 956.

Argument.

Secondly, we contend that, even if the Court has jurisdiction to make the order, the particular circumstances of this case are such that no order to wind up ought to be made. This is a petition by statutory debenture holders who have taken their security under the Act of Parliament, which says that they are entitled to recover their principal and interest by the appointment of a receiver to take possession of the tolls and profits of the company for keeping down the mortgage. Debenture holders have no security beyond this, and they are not entitled to the right of sale and foreclosure like ordinary mortgagees. The case of *In re Exmouth Docks Company* is distinctly an authority in our favour, for in that case (1) your Lordship observed that the only remedy the lender of money under the Act has is the appointment of a receiver, and he is entitled to no other remedy. That case was decided upon the authority of *Gardner* v. *London, Chatham, and Dover Railway Company* (2).

If a winding-up order is made upon this petition the effect will be to oust the general creditors of the company, who stand behind the debenture holders, while if the company is carried on we have evidence to shew that by an outlay of not more than £1000 the works may be so improved as to supply the whole district with water, and the undertaking may then be carried on at a profit. The company have the expectation of being able to raise this money, and they object to having the concern broken up and destroyed and all their interests thrown away.

Judgment.

MALINS, V.C.:—

As there appears to be no prospect of an amicable arrangement being made between the parties in this case, I must decide the not unimportant question raised by the petition, whether a company of this kind established by Act of Parliament to supply a town with water, which has also power given by their Act of borrowing money in furtherance of those objects, can be wound up if there is default in payment of principal and interest secured by debentures. This Act of Parliament was passed in July, 1867. It authorized the company to raise £1200 by debentures, and the

(1) Law Rep. 17 Eq. 189. (2) Law Rep. 2 Ch. 201.

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debenture holders were to have the security of all the property of the company, the general creditors standing behind them. The debenture holders are, therefore, the first creditors, and have all the remedies which mortgagees under the Act of Parliament can have against the property of the mortgagors. It appears that the Petitioners advanced to the company in 1869 the whole amount they were authorized to raise by debentures, namely, £1200. They took security in the usual form for repayment of the principal and interest at 6 per cent. per annum. It is admitted that not one single penny has been paid in respect of principal or interest from that day to this. The position of the Petitioners, therefore, is certainly a hard one, having for nine years been kept out of their principal and interest, and now they find that unless something is done there is no hope of anything more in the future than in the past.

What, then, are they entitled to? There are certain creditors who have no right to call on their debtor to pay the principal, as, for instance, a man who lends money to the Government, has no right to call upon the Government to repay him. The owner of £100 consols has a right to three pounds per annum for ever, but he cannot call on the Government to repay the principal. The only mode by which he can obtain his principal is by selling his stock. The question is, whether these mortgagees are entitled to say, We lent the money in the ordinary way of mortgagor and mortgagee, and we are entitled to all the remedies of mortgagees; and if you do not pay, we will sell or foreclose. But they cannot sell or foreclose. Why, then, are they deprived of these remedies? It must be because they do not stand in the position of ordinary mortgagees. They have advanced their money under the Act of Parliament, which gives them only one remedy, which is the appointment of a receiver, and with that remedy they must be content. The argument on the other side is, that if the ordinary remedy is not open to them they must break up the concern. In the case of *In re Exmouth Docks Company* (1) I said that the principle acted upon in *Gardner* v. *London, Chatham, and Dover Railway Company* (2) was applicable to that case; and the Act of Parliament having given the remedy by the appointment of a receiver

(1) Law Rep. 17 Eq. 181. (2) Law Rep. 2 Ch. 201.

only, the lender of money must be taken to have acted with the knowledge of that fact, and in reliance on that remedy which the Act of Parliament has given him. Then I referred to the reasons given by Lord *Cairns*, which were these, "Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete, or to be completed; as a going concern, with internal and Parliamentary powers of management not to be interfered with: as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated." In that case no question of winding-up could arise, but what the creditors wanted was to sell the surplus lands, and the decision was, that the creditors were not in the position of mortgagees entitled to have the lands sold, but they were entitled only to the tolls or fruits of the undertaking.

Bearing in mind the nature of these securities, what are the powers given to the holders thereof under the Act of Parliament? First, then, by the 11th section the company have power to borrow on mortgage £1200. By the 12th section the mortgagees have power to enforce payment of the arrears of interest or principal, or principal and interest due to them, by the appointment of a receiver; and by the 13th section all moneys to be borrowed on mortgage, and the interest for the time being due thereon, are to have priority against the company, and all the property of the company, over all other claims on account of any debts to be incurred or engagements to be entered into by them.

Now, when the money was advanced what had the proposed lenders to look to? In my opinion they were bound to look to the fact that they were lending money to establish a public object sanctioned by Act of Parliament, and were, therefore, only entitled to that remedy which the Act gives, and that is, the appointment of a receiver, whose duty is to receive all the tolls of the company until the whole principal and interest secured by the mortgage is paid. Beyond that the lenders have no security whatever. In

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*In re Exmouth Docks Company* (1) it was said the only result of obtaining a receiver would be that it would be found there was nothing to receive; and the same observation might be made here; but I cannot help thinking that if these gentlemen who have lost their money would endeavour to assist in improving the works the concern might still be made to yield a profit.

Upon the whole, I think the case comes within the principle of *In re Exmouth Docks Company*, in which I was guided to a great extent by the rules laid down by Lord *Cairns* in *Gardner* v. *London, Chatham, and Dover Railway Company* (2); and that these Petitioners have lent their money on the security which the Act of Parliament gives them, namely, the appointment of a receiver, and with that security they must be content. Consequently this petition to wind up the company cannot be sustained, and must be dismissed with costs. But as I think the petition was demurrable, on that ground I shall direct that the Petitioners are not to pay the costs of the affidivits which have been filed.

Solicitors for Petitioners: *Marriott & Jordan.*
Solicitor for Company: *J. B. Batten.*

(1) Law Rep. 17 Eq. 181. (2) Law Rep. 2 Ch. 201.

## *In re* AGAR-ELLIS.
## AGAR-ELLIS *v.* LASCELLES.

[1878 A. 95.]

C. A.
1878
V.-C. M.
*Aug.* 5.
C. A.
*Nov.* 11, 12, 15, 23.

*Infants—Religious Education—Rights of Father—Examination of Infants by the Court.*

A Protestant on his marriage with a Roman Catholic lady promised that the children of the marriage should all be brought up as Roman Catholics. Soon after the birth of the first child he determined that they should be brought up as Protestants, to which determination he adhered. At the time of the proceedings there were three children, girls, aged respectively nine, eleven, and twelve. The mother, unknown to the father, and in spite of his express directions, had so indoctrinated them with Roman Catholic views that ultimately they refused to go with their father to a Protestant place of worship. The father thereupon commenced an action in their names by himself as next friend, he being a co-Plaintiff, to have them made wards of Court, and took out a summons in the action for directions as to their education. The wife then presented a petition in the matter of the infants, and of the Act 36 & 37 Vict. c. 12, with a view to their being brought up as Roman Catholics. Vice-Chancellor *Malins* dismissed the petition, and made an order on the summons declaring that the children ought to be brought up as members of the Church of *England*, and ought not to be taken to Roman Catholic places of worship, and restraining the mother from taking them to confession or to Roman Catholic places of worship without the consent of the father :—

*Held*, on appeal, that the father had not forfeited his right to have the children brought up according to his own religious views, and that the Court would aid him in enforcing that right, and that the injunction had been rightly granted :

But *held*, that the declaration ought to be omitted, leaving it to the father to do what he considered to be best for the temporal and spiritual welfare of the children.

The Court refused to examine the children, considering that a stronger case was required to induce the Court to interfere with a father than with a testamentary guardian.

*Stourton* v. *Stourton* (1) considered.

Statement.

ON the 8th of February, 1864, the Hon. *Leopold Agar-Ellis*, a Protestant, married the Hon. *Harriet Stonor*, a daughter of Lord *Camoys*, who was a Roman Catholic. There were four children of the marriage, the eldest of whom, a boy, was born in November, 1864, and died in 1872. The other three, *Caroline*, *Harriet*,

(1) 8 D. M. & G. 760.



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Statement.

and *Evelyn Mary*, were born respectively on the 8th of January, 1866, the 21st of January, 1867, and the 11th of January, 1869.

Previously to the marriage a discussion took place as to the religious education of the children if there should be any. There was some conflict of evidence as to what passed on the subject, the case made by the wife being that previous to the marriage Mr. *Agar-Ellis* gave in the presence of witnesses an express unconditional promise that all the children should be brought up as Roman Catholics, and that the marriage had been agreed to on the faith of this promise. The case was dealt with on the supposition that this was the real state of facts.

The eldest child was baptized as a Roman Catholic, but, as Mr. *Agar-Ellis* stated, much against his wish. The eldest of the daughters was baptized as a Roman Catholic without the father's knowledge, and in disobedience to his express directions. The second daughter was baptized as a Protestant. The third, without the father's knowledge and against his orders, was baptized as a Roman Catholic.

On the 3rd of April, 1869, Mr. *Agar-Ellis* took the boy and the two girls who had been baptized as Roman Catholics to *St. Saviour's Church, Pimlico*, and had them formally received into the Church of *England*, and their names entered in the register of baptisms.

From the time that the children were old enough to go to church, the father, as he deposed, took them, or had them taken, to a place of worship of the Church of *England*. After church on Sundays he used to teach them the catechism of the Church of *England*, and he insisted that the nurse and governess who had the charge of the children should be Protestants, and should educate the children as Protestants, and he only allowed them to visit at the house of the wife's father on her promise that they should not go into the chapel at the house.

Mrs. *Agar-Ellis*, by an affidavit made on the 24th of July, 1878, in support of her petition, which will be mentioned hereafter, deposed as follows:—

"My children have always remained under my maternal care, and I have devoted much time and personal attention to their education, and, relying on and feeling justified by the promise

given by my husband as aforesaid, I have omitted no opportunity of imbuing them with the principles of the Roman Catholic religion. I have regularly and systematically taught them the Catholic catechism and Catholic prayers, and have very frequently taken them to Catholic churches; and I have also, though without telling, and so far as I am aware, without the knowledge of their father, caused them to receive such sacraments of the Roman Catholic Church as it is usual for children of their age to receive. The said *Caroline Agar-Ellis* has been to confession about once a month for the last three years. The said *Harriet Agar-Ellis* has been to confession at similar intervals for the last two years, and the said *Evelyn Mary Agar-Ellis* has been to confession at similar intervals during the last twelve months. All my said three children have been confirmed as members of the Roman Catholic Church by a Roman Catholic bishop.

"The said *Caroline Agar-Ellis* and *Evelyn Mary Agar-Ellis*, my second and fourth children, were baptized as Roman Catholics. Relying on the promise aforesaid, I caused them to be so baptized without the knowledge or permission of my husband.

"Under the circumstances aforesaid, and as the result of my systematic and sustained teaching, the said three above-named infants are as well instructed in all the distinctive doctrines of the Roman Church, and are as fully impressed with the truth of those doctrines, and as fully conversant with and habituated to the practices and devotional usages of the Roman Catholic Church, as it is possible for intelligent and thoughtful children of their ages to be; and although they have as aforesaid attended Protestant churches and learnt some portions of the Protestant catechism, such attendance and learning have been very reluctant, and submitted to only in unwilling obedience to the positive commands of their father, and after much expostulation with him.

"Early in the present year the said three children refused to go any more to the Protestant church, and they have never done so since. When they first refused such attendance they were punished by their father for such refusal."

Mr. *Agar-Ellis* deposed that the punishment above alluded to consisted only in his refusing them leave to spend the afternoon of

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that day at their cousins', and that he had not been aware till the spring of the present year that the children went habitually to Roman Catholic churches, and that he never knew of their having been confirmed as Roman Catholics, or of their attending confession till he learnt it from Mrs. *Agar-Ellis's* affidavit.

On the 28th of June, 1878, Mr. *Agar-Ellis* settled a sum of £100 consols upon trust for the three children, and on the 1st of July an action attached to the Court of Vice-Chancellor *Malins* was commenced by Mr. *Agar-Ellis*, and the children by him as their next friend, against the trustee to have the trusts of the settlement carried into execution, and on the 5th of July the usual judgment for that purpose was given.

On the 20th of July Mr. *Agar-Ellis* took out a summons in this action for directions as to the place where, and the persons by whom, the infant Plaintiffs ought to be educated, and, by an exhibit to an affidavit, stated that he proposed on the 3rd of August to send the children to the house of a beneficed clergyman, whom he named, to be educated and boarded.

On the 23rd of July Mrs. *Agar-Ellis* presented a petition at the Rolls in the matter of the infants and of the Act 36 & 37 Vict. c. 12, stating the ages of the children, the promise of the father before the marriage, and the facts contained in the paragraphs of her affidavit which are set out above. The petition further stated that the father had recently threatened that he would on the 3rd of August remove *Harriet* and *Evelyn* to some Protestant parsonage, and would also remove *Caroline* from the care of her mother and cause her to be brought up as a Protestant; and, in the first instance, threatened that he would prevent the mother holding any intercourse with any of her children, but afterwards said she might sometimes see or write to them on condition that she should never speak or write on the subject of religion. That, under the circumstances, any attempt to bring up the three children as Protestants would have the effect of violating their consciences, and thus of materially injuring their moral sense; and further, that the children, and particularly the eldest, were at an age when their mental and physical well-being required maternal watching and care, and therefore that any separation between them and the mother, or any check

upon the natural confidence existing between them and their mother, would be attended with most injurious results. The petition prayed that such proper directions might be given for the custody and education of the infants as should prevent their being deprived of the society and maternal care of, and free intercourse with, the Petitioner, and should admit of their being brought up as Roman Catholics; and that the Petitioner might not be debarred from seeing or writing to them, except on the terms of her not speaking or writing to them on the subject of religion; or, at all events, that such directions might be given for their education as should most conduce to their moral welfare, having regard to their previous education and present state of mind and circumstances.

The petition was transferred to the Court of Vice-Chancellor *Malins*, and came on to be heard along with the summons.

Mrs. *Agar-Ellis*, by a further affidavit, stated as follows:—

"My efforts to bring up the children Roman Catholics were never relaxed. I always enjoined them most strictly to answer their father truthfully whatever questions he might put to them in that regard. There were scenes on every occasion of their being forced by their father to go to the Protestant church. During the last two years they constantly insisted that they were Catholics, and ought not to be so compelled . . . . My husband never asked me to promise, and I never did promise, not to take our children to the Roman Catholic church, except as to their not attending service in the chapel at *Stonor*, and then only because I knew that their stay there would be short, and that they required change of air, which we had not the means to provide for them. My husband never heard our children their morning or night prayers, nor required the nurse or governess to do so. All he did require was that they should be taken to the Protestant church on Sunday, and that a chapter from a child's Bible should occasionally be read to them. Of this latter I did not disapprove. . . . . Our children are highly educated. They speak French and German, and the two elder ones play classical music, which I have taught them. These advantages are entirely owing to my own continued hard work and self-denial during the last fourteen years."

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*Bagshawe*, Q.C., and *F. G. Bagshawe*, for Mrs. *Agar-Ellis.*

*Glasse*, Q.C., and *G. C. Price, contrà.*

The case was to a great extent heard in private, and only the close of the argument, on the 5th of August, 1878, took place in open Court.

Judgment, V.-C. M.

MALINS, V.C.:—

This is perhaps the strongest case that has ever occurred shewing the misery that ensues from mixed marriages. In the year 1863 a Mr. *Agar-Ellis* was paying his addresses to Miss *Stonor*, a daughter of Lord *Camoys*. It appears from the evidence that there were two obstacles to this marriage, which existed for some time. One was pecuniary, but that on both sides was stated to have been removed. The other was religion, and the difficulty was that Mr. *Agar-Ellis* was a Protestant and a member of a Protestant family, while Miss *Stonor* was a Roman Catholic and a member of an old Roman Catholic family. After considerable difficulties, it is stated that at a visit which was paid by Lord and Lady *Camoys* and their two daughters to the Duke of *Sutherland*, Mr. *Agar-Ellis*, being a visitor in the house, in the latter part of the year 1863, agreed to give way on the subject of religion, and entered into an engagement that all the children he might have by the marriage should be brought up in the Roman Catholic religion. That was positively sworn to by Mrs. *Agar-Ellis* herself, and it is distinctly confirmed by Lord *Camoys* in his affidavit. The parties were thereupon married on the 8th of September, 1864, and the ceremony was performed according to the rites of both the Roman Catholic Church and the Church of *England*. The Duke of *Sutherland* also makes an affidavit, in which he confirms in every respect the statement made by Lord *Camoys*. Mr. *Agar-Ellis* himself, by his affidavit, admits there was that engagement, but he says that there was afterwards an arrangement, in the shape of a conversation which took place between himself and Miss *Stonor*, the effect of which was to alter or control that promise. On the other hand, Mrs. *Agar-Ellis* says that she believed, and acted on the belief, that, as he had promised his

children should be brought up as Roman Catholics, he would embrace her religion, and that she would not be called on to embrace or allow the children to embrace his religion.

The first child of the marriage was born on the 8th of November, 1864. He was a boy, and lived till 1872, that is, until he was nearly eight years of age. That child, it is admitted, was baptized as a Roman Catholic. Mr. *Agar-Ellis*, by his affidavit, says it was done very much against his wishes. But Mrs. *Agar-Ellis* says he distinctly agreed to it, and she says that her husband left it to her mother to make the arrangements, and that with his fullest approbation the elder child was baptized according to the Roman Catholic Church. It is, however, in my opinion, clear from the evidence on both sides that this baptism took place very much against his wishes, and that from that time, 1864, or certainly as early as 1865, constant differences took place between the husband and wife on this subject. Mrs. *Agar-Ellis* is a lady of education; she says she has educated her daughters with the greatest care, and I am satisfied she has done so, and Mr. *Agar-Ellis*, I am sure, entirely acquiesces in that view of the case. But it is evident that from the year 1865 down to the presentation of this petition this struggle has been going on, the father desiring the children to be brought up as Protestants, and the mother determined that they should be brought up as Roman Catholics, and taking advantage of every opportunity she had to instruct them in doctrines of the Roman Catholic Church, and to bring them up in every way she could as Roman Catholics; and I am very sorry to find that she has thought herself justified in going to such an extent as this, that she has set at defiance the authority of the father over the children, and has so far instilled these principles into the children; and I cannot but express my regret that she has done so, seeming to have entirely forgotten that by the laws of *England*, by the laws of Christianity, and by the constitution of society, when there is a difference of opinion between husband and wife, it is the duty of the wife to submit to the husband. I am also sorry to find she states in the petition that, unknown to her husband, she has had two of the children baptized contrary to his wish and knowledge in the Roman Catholic faith, and that she has taken them to confession at this early age, which is a thing well known to be most

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objectionable to Protestants. The eldest child is now twelve and a half, the second eleven and a half, and the third nine and a half years of age, and she says that the eldest child, "the said *Caroline Agar-Ellis*, has been to confession about once a month for the last three years, the said *Harriet Agar-Ellis* at similar intervals for the last two, and the said *Evelyn Agar-Ellis* at similar intervals during the last twelve months. All the said three infants have been confirmed as members of the Roman Catholic Church by a Roman Catholic bishop. The said *Caroline Agar-Ellis* and *Evelyn Mary Agar-Ellis*, your Petitioner's second and fourth children, were baptized as Roman Catholics. Your Petitioner, relying on the promise as aforesaid, caused them to be so baptized without the knowledge or permission of her husband." I mention this to shew the lamentable extent to which these differences have led, and I think the worst of all is the 13th paragraph of the petition, in which she says, "Early in the course of this year"—which I take to be January, when the eldest daughter was twelve, the second eleven, and the youngest nine—"the three children refused to go any more to the Protestant church, and they have never done so since—when they first refused such attendance they were punished by their father for such refusal"—so that it has come to this, that because the father desires to take his children to the Protestant church the children are instructed by their mother to refuse, and they do refuse absolutely, to go to church with their own father, and he has punished them accordingly—that is, he refused to allow them to pay a visit, or something of that kind. I do not wonder that he marked his sense of displeasure, for I cannot imagine a more lamentable state of things. Under these circumstances, I have the painful duty to decide what ought to be done. The principles of this Court are the principles of common sense and the principles of propriety, that the children must be brought up in the religion of the father. The father is the head of his house, he must have the control of his family, he must say how and by whom they are to be educated, and where they are to be educated, and this Court never does interfere between a father and his children unless there be an abandonment of the parental duty, and that may be considered to take place when the father brings them up irreligiously, as in the celebrated case of *Shelley* v.

*Westbrooke* (1), where Mr. *Shelley* proposed to bring his children up as infidels or atheists; where there is immoral conduct, as in another celebrated case of *Wellesley* v. *Wellesley* (2); or where the Court is of opinion that the father has been guilty of abandonment of the parental duty. Then and then only will the Court interfere. That the children must be brought up in the religion of the father is decided by every case in this Court, and as instances I may notice *Davis* v. *Davis* (3) and *Hill* v. *Hill* (4). *Davis* v. *Davis* is a remarkably strong case, because the question there arose after the death of the father, who was a Roman Catholic, and the son had shewn the strongest reluctance to be brought up as a Roman Catholic from seven years of age downwards, and he was then twelve, and had not only said so but written it, yet the father being dead, and having given directions how this child should be brought up, the direction of the Court by Lord *Hatherley*, then Vice-Chancellor *Wood*, was, that the child should be brought up in the religion of his father. *Hill* v. *Hill*, a decision by the same Judge, is to the same effect; but perhaps this doctrine has never been more distinctly or better expressed than it is by Lord *O'Hagan*, in the case of *In re Meades* (5). In that case the father had engaged, as in the present case, that the children should be brought up as Roman Catholics; he had allowed the mother of these children every hour of her life to instil into them the doctrines of the Roman Catholic religion, and after the mother died, which she did when the children were six and seven years old, he had allowed the sister of the wife to continue in that course for three years more, until the children were in their tenth year, and then the father happening to marry again, made up his mind that the children should be brought up as Protestants. This was resisted by *Mary Catherine Romayne*, the maternal aunt of the minors, who presented a petition praying that the minors might be made wards of Court, and for the usual inquiries and directions; and also that *Robert Warren Meades*, the father of the minors, might be restrained from in any way interfering with

(1) Jac. 266, n.
(2) 2 Bli. (N.S.) 124.
(3) 10 W. R. 245.
(4) Ibid. 400.
(5) Ir. Law Rep. 5 Eq. 98.

8 Jur. N.S. 609

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the religion or the religious education of the minors, the petitioner undertaking to have the minors maintained and educated in a manner suitable to their condition in life. Lord *O'Hagan* is a Judge for whom I entertain the greatest possible respect. He is a Roman Catholic, as we all know, and he had here to decide whether the children should be brought up in the religion of the father, which was Protestant, or in the religion of the mother, which was Roman Catholic, and where there had been as positive an undertaking on the part of the father as could be given, which was not in controversy. Now Lord *O'Hagan*, on the subject of the duty of the father, expresses it thus (1), and every word of this is applicable to the present case: "The authority of a father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law. It is not to be abrogated or abridged, without the most coercive reason. For the parent and the child alike, its maintenance is essential, that their reciprocal relations may be fruitful of happiness and virtue; and no disturbing intervention should be allowed between them, whilst those relations are pure and wholesome and conducive to their mutual benefit." Then there is another passage, which is also very pertinent to this case. I asked Mr. *Bagshawe* if he could tell me of any instance where the father and the mother being both alive, the Court has interfered against the parental authority of the father, and he has not succeeded in doing so. Upon that subject Lord *O'Hagan* says (2): "I have said that, upon the affidavits I have no doubt as to the making of the promises imputed by the petitioner to the respondent. From the breach of it has arisen all the strife and bitterness which have destroyed the kindly relations once subsisting between the parties: and one can hardly avoid a feeling of natural regret that an engagement so solemn, so openly avowed, so strengthened by repetition, so confirmed by the consecration of the grave, should have been disregarded." Lord *O'Hagan* in that case came to the conclusion that it was his duty to have the children brought up, not in the religion of the mother, but of the father.

Now, in addition to these cases which I have mentioned as

(1) Ir. Law Rep. 5 Eq. 103. (2) Ir. Law Rep. 5 Eq. 111.

shewing the universal doctrine of this Court, there is the case of *In re Newbery* (1), before Vice-Chancellor *Stuart*, and before the Court of Appeal (2), in which the same authority is acted on; and finally, there is the case of *Hawksworth* v. *Hawksworth* (3), where the child had been brought up as a Roman Catholic by her mother, and yet at the age of seven or eight the decision of the Court was plain and distinct that she must be educated in the faith of her father; and that was not while the father was alive, but after he was dead, because that is the rule of this Court, which is never departed from except under extraordinary circumstances.

Then Mr. *Bagshawe* very much pressed upon me that it was necessary to come here because the father had threatened to send his children to a Protestant clergyman, to be brought up in the Protestant religion. He has told his wife that she may go and see the children when she thinks fit, and he has given her the freest access to them provided that she will not interfere with their religious training. But I have not to decide on that point, because Mr. *Agar-Ellis* has submitted his children to the jurisdiction of this Court by voluntarily making them wards of Court some months ago, and he has taken out a summons in my Chambers asking for directions in what manner the children are to be educated and where they are to go; that summons stands adjourned to come on before me. Therefore any question of the father exercising any harsh power may be dismissed.

Mr. *Bagshawe* says it comes under Lord *Chelmsford's* Act, and he refers me to *In re Taylor* (4), before the Master of the Rolls, which case decides nothing more than I have decided in several cases, namely, that when the father abandons his parental duty, deserts his wife and takes the children away, the children will be delivered to the mother and retained by her till they are sixteen; but in this case the father has never taken the children away. Surely, before you apply under this Act the father must do something shewing a positive intention to take them away; and I am clearly of opinion that this Act of Parliament has no application. Therefore my opinion is, that, upon the general doctrine of the Court, this petition is wholly unsustainable. It is a petition by the mother asking the Court to interfere with the parental authority of the

(1) Law Rep. 1 Eq. 431.
(2) Ibid. 1 Ch. 263.
(3) Law Rep. 6 Ch. 539.
(4) 4 Ch. D. 157.

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father where there has been no impropriety of conduct, and not a syllable alleged against the father; such a petition, therefore, must necessarily be dismissed.

But in truth the petition has rested on this, that Mr. *Agar-Ellis* promised, before the marriage, that the children should be brought up as Roman Catholics. Now, I have written down the result, in a very few words, of all the cases, and they amount to this—that a promise by the father that his children should be brought up in a religion other than his own is thoroughly settled not to be binding. For that, I think, I will take the first case of *In re Browne* (1), which is a remarkable decision by Sir *Cusack Smith*, the Master of the Rolls in *Ireland*, and has been commented upon and cited, but always with approbation, in which he came to this conclusion, as the marginal note very distinctly expresses: "A father has a right to direct and regulate the religious faith in which his child should be brought up, and the Court will not interfere with that right unless there is an abuse of parental authority. To insist on bringing up the child in his own religion, notwithstanding a verbal agreement to the contrary, entered into before marriage with his wife, is not an abuse of parental authority which will induce the Court to interfere. Testamentary guardians appointed by the father have the same right to direct the religious education of a child according to the father's wishes. A contract entered into before marriage that the children shall be brought up in a particular religion is not binding on the husband, and cannot be enforced in a Court of Equity." Sir *C. Smith* in his judgment says (2): "How can the Court enforce the performance by the father of the child of such a contract? Is the Court to separate the child from its father to prevent a violation of the contract? Is the Court to separate the husband and wife, and place the children with the wife, to enable her to educate them in the faith which she professes, and in which the husband contracted the children should be brought up? Who is to provide the funds to educate the child in the religion which the father objects to? Is the Court to apply the property of the husband during his lifetime, and against his will, to the education of his child in that form of religious faith from which he conscientiously differs, and the adoption of which by the child he believes will be

(1) 2 Ir. Ch. Rep. 151. (2) 2 Ir. Ch. Rep. 160.

destructive to his eternal welfare? By what process is the property of the husband to be sequestered for such purpose? Is the Court to pronounce a decree or order against the husband, who, from the purest and most conscientious motives, does not perform his agreement? And is the Court to issue an attachment against him and lodge him in gaol for his life, unless he consents that his child shall be brought up in that religious faith which he believes to be unscriptural and erroneous, and furnishes the funds necessary for that purpose? No doubt, if a father were to permit his children to be brought up in that form of the Christian religion from which he dissented, until they had arrived at that period of life when they would be capable of forming and entertaining particular religious views, the Court might interfere?" That was the ground on which I refused to interfere, and on which the Court of Appeal refused to interfere in *Andrews* v. *Salt* (1), where the father had not only agreed that the child should be brought up as a Protestant, he being a Roman Catholic, but he allowed the child to be baptized in the Protestant faith, and allowed her to be educated, and after his death her Roman Catholic relatives had allowed her to be educated in the Protestant religion, until there was such an amount of acquiescence that I thought I was justified in saying they had no right to interfere; and in that I was confirmed by the Court of Appeal, who gave even stronger reasons than I did for taking that course.

Therefore I come to the decision in this case that the father, however absolutely he may have promised, is at liberty to revoke it. He may alter his own views. He may not have cared much about religion when he married, but if he afterwards thinks more of religious subjects he is at liberty to say, "I conscientiously dissent from the tenets of the Roman Catholic Church," or the converse, for it makes no difference, and I must have my children brought up in that form of religion which I alone can sanction. Lord *O'Hagan*, in the case I have referred to, adopts to the fullest extent the opinion of Sir *Cusack Smith* in *In re Browne* (2), that the promise of the father is absolutely null, and cannot be in any way enforced. The latest authority on this subject is the case of *Andrews* v. *Salt*. In that case Lord Justice *Mellish*, who

(1) Law Rep. 8 Ch. 622, 636. (2) 2 Ir. Ch. Rep. 160.

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delivered the judgment of Lord Justice *James* and himself, said (1): "The first question we shall consider is, what is the legal effect of an agreement made before marriage between a husband and wife of different religious persuasions, that boys should be educated in the religion of the father and girls in the religion of the mother? We are of opinion that such an agreement is not binding as a legal contract. No damages can be recovered for a breach of it in a Court of Law, and it cannot be enforced by a suit for specific performance in Equity. We think that a father cannot bind himself conclusively by contract to exercise in all events in a particular way rights which the law gives him for the benefit of his children and not for his own. We entirely agree with the decision of the Lord Chancellor of *Ireland* in *In re Meades* (2)."

In *Andrews* v. *Salt* (3) the guardians had allowed the children to be brought up in a certain way, and so they did in *Stourton* v. *Stourton* (4), where the father was a Roman Catholic and so was the mother, but the mother became a Protestant, and the guardians allowed the children to be brought up as Protestants till they were nine years of age, and there was that kind of acquiescence which the Court thought made a different case, and there the Court did not think fit to interfere with the discretion of the mother. Therefore, the only ground on which this petition could be supported entirely fails, because the law is absolute that any engagement by a father to have his children brought up in another religion than his own, however absolute, is null, and he is at liberty to revoke it, and to insist that his children in his lifetime shall be brought up in his religion, and to direct by his will that they should be so after his death. On these grounds I I can come to no other conclusion than that the petition is unsustainable. These children must be brought up as Mr. *Agar-Ellis* may think fit, and, subject to any suggestion I may make in Chambers when the scheme comes before me, he must do as he thinks fit with respect to their education.

There is one point I have not mentioned. My reasons for not seeing the children were, that in the view I have taken it would

(1) Law Rep. 8 Ch. 636.
(2) Ir. Law Rep. 5 Eq. 98.
(3) Law Rep. 8 Ch. 622.
(4) 8 D. M. & G. 760.

be useless, because I am convinced I must act upon the principle which Lord *O'Hagan* acted on, and say that they must be brought up in the religion of the father.

*Glasse*, Q.C., asked for an order in comformity with the order made in *In re Newbery* (1), following the decision in *Bligh* v. *Bligh*, *Seton* on Decrees (2).

A discussion then arose as to bringing on the summons in Chambers, and in consequence of the near approach of the Long Vacation it was arranged by consent that an order should now be made upon the summons.

MALINS, V.C.:—I dismiss the petition, and make an order upon the summons by the father that Mrs. *Agar-Ellis* shall not take the children without the consent of the father to a Roman Catholic Church, that she shall not take them to confession, and that she shall not inculcate in their minds the doctrines of the Roman Catholic Church as distinguished from the Protestant. With regard to the custody of the children, I cannot interfere with the right of Mr. *Agar-Ellis* to do as he pleases with his own children. I intend my judgment to leave him master of his own house.

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The order made was as follows:—

Dismiss the petition with costs.

Declare that the infant Plaintiffs ought to be brought up in the communion, doctrines, and worship of the Church of *England* as by law established, and that the said infants ought to attend the public worship of the said church, and that they ought not to be taken to attend the Roman Catholic places of worship referred to in the said petition.

Order that the said *Harriet Agar-Ellis* be restrained from taking the said infants, or any of them, or causing or procuring or permitting the said infants or any of them to be taken, without the consent of the said *Leopold G. F. Agar-Ellis*, to confession, or to any church or place or places of worship where worship is performed otherwise than according to the rites and ceremonies of the Church of *England* as by law established.

Mrs. *Agar-Ellis* appealed. C. A.

The appeal came into the paper on the 8th of August, and the

(1) Law Rep. 1 Eq. 431. (2) 3rd Ed. vol. ii. p. 715.

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Court directed it to stand over till the November sittings, making an interim order that the children should remain in the common house of the parents, both parents having access to them, with an injunction against Mrs. *Agar-Ellis* in the terms above; and a similar injunction against Mr. *Agar-Ellis* taking the children to Protestant places of worship without the consent of his wife.

The appeal came on to be heard on the 11th of November.

Argument.

Sir *H. S. Giffard*, S.G., *Bagshawe*, Q.C., and *F. G. Bagshawe*, for the Appellant:—

We do not deny that a father has power to retract a promise made on his marriage, that the children shall be brought up in a particular religion; but the existence of such a promise justifies the wife in endeavouring to secure its fulfilment. If the father retracts such a promise the Court will consider the interests of the children when made wards of Court, especially if the father has himself placed them under the jurisdiction of the Court. If the Court finds that the religious education of the children has been continued so long that they have acquired definite and fixed religious convictions, the Court will respect those convictions, and refuse to allow them to be unsettled. And it will take this course irrespective of the manner in which, or the person by whom, the convictions have been instilled, or what the nature of the religious opinions may be.

[JAMES, L.J.:—Would you say the same of the children of a Christian father who had been instructed without his knowledge in the Mahomedan religion? *Skinner* v. *Orde* (1) bears upon this subject.]

Probably the Court would not pursue the same course in such a case; for Christianity is part of the law of this country. But with respect to different forms of the Christian faith the Court has repeatedly acted in this way, and the Judge has, where he thought it necessary, himself examined the infants, to see if they had an intelligent understanding of the doctrines in which they had been instructed. In all these cases the welfare of the children is the main question to be considered: *Creuze* v. *Hunter* (2);

(1) Law Rep. 4 P. C. 60. (2) 2 Cox, 242; Jac. 250, n.

*Shelley* v. *Westbrooke* (1); *Colston* v. *Morris* (2); *Lyons* v. *Blenkin* (3); *Talbot* v. *Shrewsbury* (4); *Hunt* v. *Hunt* (5); *Re North* (6); *Stourton* v. *Stourton* (7); *In re Browne* (8); *Davis* v. *Davis* (9); *Hill* v. *Hill* (10); *Austin* v. *Austin* (11); *In re Newbery* (12); *Hawksworth* v. *Hawksworth* (13); *In re Grimes* (14). The father's authority is a trust, not an arbitrary power: *In re Meades* (15); *Witty* v. *Marshall* (16); *Andrews* v. *Salt* (17). The father has submitted himself to the Court instead of standing on his rights out of Court, and the Court is at liberty to do what it considers best for the infants. In *In re Grimes* and *In re Meades* the Court saw the infants, and distinctly laid down that it had jurisdiction to interfere between father and child in a matter of religious education.

[THESIGER, L.J.:—Is there any authority shewing that the father by filing a bill can give up his parental authority to the Court?]

To a certain extent his parental authority is thereby given up; for when the child becomes a ward of Court its residence and custody cannot be altered without the consent of the Court.

[BAGGALLAY, L.J.:—If a girl of fifteen became a Roman Catholic and left her father's house, could he coerce her?]

We apprehend that compulsion would not be allowed.

[BAGGALLAY, L.J.:—Suppose a boy said, "I will go to sea?"]

The Court would not allow its ward to do anything improper; but suppose the ward a girl, and the father wished to bring her up for a ballet-dancer, would the Court allow it?

[JAMES, L.J., referred to *In re Lyons* (18), where a Jewish girl went to reside with Christians, and the Court refused to exercise

(1) Jac. 266, n.
(2) Ibid. 257.
(3) Ibid. 245.
(4) 4 My. & Cr. 673.
(5) 2 Con. & Law. 373.
(6) 11 Jur. 7; 8 L. T. 309.
(7) 8 D. M. & G. 760.
(8) 2 Ir. Ch. Rep. 151.
(9) 10 W. R. 245.
(10) 10 W. R. 400.
(11) 34 Beav. 257.
(12) Law Rep. 1 Ch. 263.
(13) Ibid. 6 Ch. 539.
(14) Ir. L. Rep. 11 Eq. 465.
(15) Ibid. 5 Eq. 98.
(16) 1 Y. & C. Ch. 68.
(17) Law Rep. 8 Ch. 622.
(18) 22 L. T. (N.S.) 770.

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the Chancery jurisdiction, but without prejudice to an application for a *habeas corpus.*]

[Sir *H. S. Giffard,* S.G.:—The *habeas corpus* was ultimately refused, as she was above sixteen when it was applied for (1).]

The jurisdiction of the Court is extended by 36 & 37 Vict. c. 12; and *In re Taylor* (2) shews the principles by which the Court will be guided in exercising this extended jurisdiction. It is an abuse of parental authority for a father to turn round and alter the religious education of the children.

*Davey,* Q.C., and *G. C. Price,* for Mr. *Agar-Ellis:*—

We contend that the Court will interfere with the authority of the father in two cases only: where he has abused it, or where he has for a length of time allowed the children to be brought up in a different way from that in which he now wishes them to be educated: so abandoning his authority. In the latter case, the father has acquiesced and permitted a state of things to grow up which cannot, without injury to the children, be disturbed, and so has disentitled himself to have his wishes attended to. There is no case in which the Court has compelled a father, out of his own means, to bring up his children in a faith different from his own; and it was held in *In re Meades* (3), *In re Browne* (4), and *Andrews* v. *Salt* (5), that the Court will not do so. Here there is no fund out of which the children can be maintained except the father's income, as no one on the lady's side offers to provide for them.

[JAMES, L.J.:—Does not the father's application to the Court do away with your objection as to the funds?]

It may well be that if the father declines to provide funds for any but a Protestant education the Court may decline to make any order to help him; but we contend that the Court will not make any order against him. Then as to the Act 36 & 37 Vict. c. 12, it was intended to extend Mr. Justice *Talfourd's Act,* 2 & 3 Vict. c. 54; *Warde* v. *Warde* (6); and was never intended to support a wife in disobedience to her husband; the petition therefore was rightly dismissed. There is no case in which the Court has

(1) See the *Queen* v. *Howes,* 30 L. J. (M. C.) 47.
(2) 4 Ch. D. 157.
(3) Ir. L. Rep. 5 Eq. 98.
(4) 2 Ir. Ch. Rep. 151.
(5) Law Rep. 8 Ch. 622, 636.
(6) 2 Ph. 786.

expressed an opinion during the life of the father as to the religious education of the children, except in cases of immorality or where the father has acquiesced in the children being brought up in a different religion. *In re Meades* (1) and *In re Grimes* (2) were cases of that kind. Here there has been no abandonment of the father's rights. Mr. *Agar-Ellis* directed his children to be brought up as Protestants, they had a Protestant nurse and then a Protestant governess, and he never knew that they were receiving any but a Protestant education. The wife was under no mistake as to the faith in which he wished the children brought up, but she secretly acted in opposition to his wishes. In *Lyons* v. *Blenkin* (3) Lord *Eldon* explains the jurisdiction. *In re Meades* and *In re Grimes* were strong cases of abandonment. The practice of the Court seeing the children is not to be extended. It is a question of discretion whether the Court will do it. In *Hawksworth* v. *Hawksworth* (4) the Vice-Chancellor expressed his regret that he had seen the child, and from the language of the Lords Justices on the appeal it is to be inferred that they would not have done what was done in *Stourton* v. *Stourton* (5). The practice tends to make mothers indoctrinate young children with controversial points, which is highly undesirable, and it furnishes an unsafe test as the children are sure to be prepared for the interview. It is said that it is an abuse of the father's authority for the father to turn round and alter the religious education of his children. It might be so if he capriciously turned round after a long period of acquiescence; but here he has not acquiesced, and he is the proper judge whether the scheme of education shall be altered, and it is not capricious for him to say that there shall no longer be a double mode of education. The term "abuse of the father's authority" means something quite different from this: *De Manneville* v. *De Manneville* (6). It applies to such a case as *Shelley* v. *Westbrooke* (7), where the father was bringing up the children with no religious education at all, or *Wellesley* v. *Wellesley* (8), where the father was living an openly immoral life. Where the father is *bonâ fide* exer-

(1) Ir. L. Rep. 5 Eq. 98.
(2) Ibid. 11 Eq. 465.
(3) Jac. 245.
(4) Law Rep. 6 Ch. 539.
(5) 8 D. M. & G. 760.
(6) 10 Ves. 52, 64.
(7) Jac. 266, n.
(8) 2 Bli. (N.S.) 124.

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cising his judgment the Court will not interfere with him, though it may think that its own discretion would have been exercised differently. If a father chose to give his son who was heir to a dukedom nothing but a mere elementary education, the Court would not interfere. There is nothing, however, in the present case to shew that the father is not exercising a sound discretion. The children have been subjected, unknown to him, to proselytising influences, and it is evident that there are other persons standing behind the mother. The Court will give credit to the *bonâ fide* opinion of the father that it will be no injury to the children to be now brought up as Protestants. Then as to whether the Court will see the infants, there is a wide difference between the position of a father and a testamentary guardian. The guardian stands in a purely fiduciary position, and is under no obligation to maintain the infants out of his own funds; he is therefore subject to the jurisdiction of the Court in a different way from a father. This distinction is recognised in all the cases, and is clearly pointed out in *Andrews* v. *Salt* (1). We do not deny the jurisdiction of the Court to interfere during the life of the father, but the cases all shew that it is to be exercised with great caution, and it never has been exercised except in cases of immorality or abandonment of the father's authority. The fact that the father himself makes an application to the Court cannot give the Court a more extended jurisdiction against him. We ask the Court for an order to "strengthen the hands" of the father, according to the expression used by Lord *Talbot* in *Lord Raymond's Case* (2), in the case of a guardian. In *Todd* v. *Lynes* (3), the Court compelled delivery up of a child to a testamentary guardian, and it must have the same power to interfere on behalf of a father. A deed by which a father gives up his power over his children is invalid: *Vansittart* v. *Vansittart* (4). The Act 36 & 37 Vict. c. 12, s. 2, partially repealed that law, but that Act only provides for cases where, on a separation, it is agreed that the children shall be given up to the mother. In other cases the law as laid down in *Vansittart* v. *Vansittart* is still in force, and it is there strongly laid down that for a father to delegate his power to another person

(1) Law Rep. 8 Ch. 622, 636, 637.
(2) Ca. temp. Talb. 58.
(3) Cited in *Simpson* on Infancy, p. 134.
(4) 2 De G. & J. 249.

or to the Court is *ultrà vires*. It is said that the children have acquired religious convictions, but what is called conviction in the case of children of these ages is merely the result of teaching and of predilection for the teacher, and is not to be regarded in the same way as the conviction of an adult who weighs the arguments on both sides. *Nugent* v. *Vetzera* (1) shews that the wishes of infants even at the age of fifteen or sixteen will not be regarded.

Argument.

[JAMES, L.J.:—That case turned on the duty of the Court to recognise Austrian law as to Austrian infants.]

The case is analogous in principle to this. The Court will not interfere with the legal right on account of the infant's predilections.

Sir *H. Giffard*, S.G., in reply:—

It is assumed on the other side that these children for years were brought up as Protestants, but the father must have been perfectly sure all along that they were receiving Roman Catholic instruction from their mother. The evidence shews that for two years there were scenes with them when their father took them to Protestant places of worship, and at last they refused to go. Now the Court is asked to compel them to go whether they like it or not. Great danger of unsettling their religious views altogether will arise: *Witty* v. *Marshall* (2).

[JAMES, L.J.:—If the attempt to change a person's religious views is necessarily prejudicial to his moral and religious welfare, as tending to unsettle him, then all missionary efforts are wrong.]

The rights of the father are talked of in a fallacious way. The old cases lay down the law in a very peremptory way, but it is materially varied by the Acts, and when once the jurisdiction of the Court has attached by the infants becoming wards of Court, the Court has only to consider what is most for their benefit.

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Nov. 23. JAMES, L.J., delivered the judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.):— Judgment, C. A.

The material facts of this case are few and undisputed. On the

(1) Law Rep. 2 Eq. 704. (2) 1 Y. & C. Ch. 68, 73.

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treaty for a marriage afterwards contracted between a gentleman and a lady of different religious persuasions, the gentleman promised the wife and her friends that any children to be born of the marriage should be brought up in the lady's religious faith. There is some controversy between the parties as to whether this promise was not subject to or qualified by some private understanding between the husband and wife, but, for the purposes of this judgment, it is assumed to be an absolute, unconditional, and unqualified promise. After the marriage and immediately after the birth of the first child, the husband was minded to retract that promise and break that engagement, and from that time he has adhered, without the slightest wavering, to his determination that the children, of whom there are three—girls, of ages varying at the time of the commencement of these proceedings from nine and a half to twelve and a half years, should be brought up in his faith. The mother conceived herself to be warranted in disregarding her husband's express and positive wishes and commands as to the religious education of her daughters, and availed herself of all the opportunities afforded by the relations between a mother and daughters, who had never been separated, not only to impress their minds with the great cardinal truths and the religious and moral duties common to both modes of faith, but to instruct and indoctrinate them, so far as they were capable of receiving them, with the peculiar tenets constituting the characteristic difference of her own Church, and to accustom them, as a matter of religious duty, to the performance of certain religious acts, the practical expression of those peculiar tenets, such as the adoration of the Virgin, the invocation of patron saints, and the practice of confession. It is not denied that this was done without the knowledge of the husband, except that he must, it is suggested, have known that these girls of tender years were in the habit of saying their morning and evening prayers at their mother's knee. Under the influence of this teaching, the children at last broke into open revolt against their father, and positively refused to obey his directions to go, as they had previously done, to his church.

Upon this the father determined to remove the children from his home and place them under tuition with persons of his own creed, to the end that they might be properly instructed therein,

and further determined to prevent the access of the mother unless she promised not to speak to them on religious subjects. Hence the petition of the mother complaining of this threatened separation, and the suit at the instance of the father making the children wards of Court, and, in effect, seeking the assistance of the Court in the performance of his duty and the exercise of his rights as father.

On the wife's petition it appeared to the Court unnecessary to hear the Respondent's counsel. As between the husband and wife, it is manifest that the wife could not, by a course of consistent and persistent disobedience to the husband's wishes and commands, give herself any right. It was conceded by counsel, and, in truth, it is on principle and authority settled so as to be beyond question or argument, that the ante-nuptial promise is, in point of law, absolutely void. The husband had in the plainest terms expressed his determination so to treat it, and to assert and act upon his legal rights, the performance of which he is entitled to say he conceives to be his paramount paternal duty. As between the husband and the wife, therefore, the question is to be determined as if there had never been any such promise, and just as if she or her husband had embraced a new faith after the marriage. Under these circumstances there can, in our judgment, be no question that it is the husband's undoubted legal right to remove his children from the influence of a mother who is avowedly using that influence to thwart his wishes and plans as to their religious training and education, and to impose as a condition of her access to them a promise that she would not use that access for a purpose prohibited and lawfully prohibited by him, and that the wife, therefore, has failed to shew any legal ground in support of her petition.

But the main argument before us has been, and has properly been, not on any question of conflict of rights between husband and wife, for there can be no such conflict as to the education of children, but as between the father and the children themselves, or as between the father and the law which is bound to protect the children from any abuse of the parental power. It is conceded that by the law of this country the father is undoubtedly charged with the education of his children. The right of the father to the

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custody and control of his children is one of the most sacred of rights. No doubt, the law may take away from him this right or may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But, in the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the Court has never yet interfered with the father's legal right. It is a legal right with, no doubt, a corresponding legal duty; but the breach or intended breach of that duty must be proved by legal evidence before that right can be rightfully interfered with.

It is contended that he does intend to commit such a breach of his duty, because he is about to disregard the considerations on which several eminent Judges have considered themselves bound to act in dealing with infants under the jurisdiction of the Court. In *Stourton* v. *Stourton* (1), the learned Judges expressed themselves as follows:—The Lord Justice *Knight Bruce* said (2), "At the close of the argument, I was unable to consider it otherwise than very possible that, notwithstanding the early age of this boy, his mother, a convert, might so effectually have availed herself of the full opportunity afforded by the paternal relatives as to have made religious impressions on his mind to a depth and an extent rendering dangerous and improper any attempt at important changes in them. It was my opinion, accordingly, and that, also, of my learned Brother, that we should have an interview with the lad." After stating what passed at the interview, the Lord Justice *Knight Bruce* added that the boy spoke in a manner "convincing me that the Protestant seed sown in his mind has taken such hold that if we are to suppose it to contain tares, they cannot be gathered up without great danger of rooting up also the wheat with them. Upon much consideration, I am of opinion that the child's tranquillity and health, his temporal

(1) 8 D. M. & G. 760. (2) 8 D. M. & G. 767.

happiness, and, if that can exist apart from spiritual welfare, his spiritual welfare also, are too likely now to suffer importantly from an endeavour at effacing his Protestant impressions not to render any such attempt unsafe and improper." And the Lord Justice *Turner* said (1), "Where, as in the present case also, the application to this Court has been delayed, and the children have been suffered to receive religious impressions different from those which the father entertained, other and far more serious considerations present themselves—the wishes of the father may be in conflict with the wellbeing and even with the safety of the children,—and in order to ascertain whether this is the case or not it becomes necessary to see what is the extent of the impression which has been made upon the minds of the children, and to consider what may be the danger of disturbing that impression . . . . That the minds of children are capable at a very early age of receiving strong impressions upon matters of religion, as well as upon other matters, is not to be denied; and having seen the infant plaintiff in this case, and considered what passed at our interview with him, I am satisfied that his mind has received impressions, and strong impressions too, upon religious subjects, which are at variance with the faith which his father professed. I have felt bound to consider, therefore, what might be the result of disturbing those impressions. It was urged at the bar that the opinions of a child so young could not be fixed, and that the impressions which this child has received might be removed by a different course of instruction and different associations. It might be so; but, on the other hand, may it not be that the impressions which have been formed might lead to the instruction which would be given being received with carelessness or indifference, or, which would certainly not be less dangerous or less destructive to the character of this boy, with affected acquiescence? May it not be that the attempt to force upon this child a different faith might end in unsettling his existing impressions, and substituting no fixed impressions in their place. I much fear that it would be so." And the same thing in substance has been said by other Judges in other cases.

We are asked in this case ourselves privately to examine the

(1) 8 D. M. & G. 772.

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children, and to satisfy ourselves by that examination that these children, of the ages I have mentioned, have, to use the language of *Stourton* v. *Stourton* (1), "received religious impressions to a depth and an extent rendering dangerous and improper any attempt at important changes in them," and so to satisfy ourselves that the father is about to abuse his parental authority by seeking to disturb such religious convictions. With all respect to the eminent Judges who decided *Stourton* v. *Stourton*, we should decline to examine a child of such very tender years as the child there was. The children here are, or at all events the eldest is, considerably older than the boy there was. But that case was the case of a testamentary guardian, a case of mere and pure trust, which is essentially under the jurisdiction of the Court, and under a jurisdiction always exercised with the widest judicial discretion. And the same is to be said of all the cases in which the Court has acted in the like manner. In some of the cases cited to us the Judges in *Ireland* did examine the children, even where the father was the respondent, but in the result left the father in possession of his legal right; and even in those cases a ground was laid for the jurisdiction by reason of the father's previous conduct in respect of the children's education bringing it within the category of abdication. It is not, in our judgment, necessary further to examine those cases, because, in our judgment, however weighty, and they are very weighty, the considerations expressed in *Stourton* v. *Stourton* and the other cases, they are weighty considerations for the father to deal with, without being subject to appeal to or revision by this Court. If a good and honest father, taking into his consideration the past teaching to which his children have been, in fact, subject, and the effect of that teaching on their minds, and the risk of unsettling their convictions, comes to the conclusion that it is right and for their welfare, temporal and spiritual, that he should take means to counteract that teaching, and undo its effect, he is by law the proper and sole judge of that, and we, as Judges of the land, have no more right to sit in appeal from the conclusion which he has conscientiously and honestly arrived at than we should have to sit in appeal from his conclusion as to the particular church his children should attend, the par-

(1) 8 D. M. & G. 760.

ticular sermons they should hear, or the particular religious books to be placed in their hands. He is quite as likely to judge rightly as we are to judge for him. At all events, the law has made him, and not us, the judge, and we cannot interfere with him in his honest exercise of the jurisdiction which the law has confided to him.

This being his right, has the father abdicated such right and submitted the whole matter to the judgment of the Court by being himself party as next friend to the institution of the action making the children wards, and himself seeking the directions of the Court as to their education? We are of opinion that if the father had the power so to delegate his duty, which we doubt, it would not be fair or right to hold that he had unwittingly surrendered his right by a proceeding evidently taken for the enforcement of it, and for obtaining the assistance of the Court in vindication of it.

We come now to the consideration of the last point, and the only point on which we have any doubt—viz., whether the Court should interfere at all; whether the Court, recognising the father's undoubted right as master of his own house, as king and ruler in his own family, can be called on by him to be ancillary to the exercise of his jurisdiction, and whether he ought not to be left to enforce his commands by his own authority within his own domain; and that was throughout the argument and at the close of it the very strong inclination of our opinion. We felt and feel a difficulty about the Court's enforcing an order of a private person which it disclaims the right of examining. But it is not a question between the father and the Court; it is a question of the wards. And, being of opinion that the father has retained his right to direct the religious education of his children, and the father being minded that they should not be taken to mass, confession, or the like, the causing or permitting them to be so taken, in direct disobedience to the father's commands, is a wrong to them as well as to him. I perceive that the injunction is confined as follows:—That the mother be restrained from taking the said infants or any of them, or causing, procuring, or permitting them or any of them to be taken, without the consent of the father, to confession, or to any church or place or places of worship

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where worship is performed otherwise than according to the rites or ceremonies of the Church of *England* as by law established,—and that injunction is in accordance with precedents which have been produced to us. The Court has in other matters and under other circumstances protected wards by strengthening the hands of guardians, and it is safer not to disclaim or narrow its right or duty in that respect. We think, therefore, that the injunction of the Vice-Chancellor ought to be sustained. But, having regard to the ground on which we base our decision on the main subject—viz., the power and jurisdiction of the father—we think the declaration ought to be omitted, so as to throw on the father the whole responsibility of doing now, and during the remaining years of his children's respective minorities, what is right and proper. He ought to discard, and we have no doubt will discard, all thought of personal dignity or personal supremacy or of triumph in a personal struggle. The law trusts to him that he will, rising above all such petty feelings, have a sole regard to what he conscientiously believes to be for the temporal and spiritual welfare of his children; and we, pronouncing what we deem the law to be, must leave the matter to his sense of parental duty and to his conscience.

Solicitors: *Bowlings, Foyer, & Hordern; Harting & Sons.*

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*Nov.* 14, 21.

## *Ex parte* ODELL. *In re* WALDEN.

*Bill of Sale—Registration—Inventory of Goods with Receipt for Purchase-money—Contemporaneous Agreement by Purchaser to let the Goods to Vendor—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 2, 7.

14 B D 83.

*C.*, on the 18th of July, advanced *W.*, who had then an execution in his house, £150, which was employed partly in paying out the execution. An inventory was made of *W.'s* furniture, and at the foot of it *W.* signed a receipt for the £150, as "for the absolute sale" to *C.* "of the above-mentioned articles." On the same day a written agreement was entered into between *C.* and *W.* for the letting of the same furniture (specified in a schedule) by *C.* to *W.* for two months for £170, to be paid by *W.* to *C.* on the 18th of September, or such other time as might be agreed on. The agreement gave *C.* power, in case the £170 should not be duly paid, or if at any time during the continuance of the agreement the goods should be taken

under an execution or distress, or *W.* should become bankrupt or take proceedings for liquidation of his affairs or composition, or on the happening of some other specified events, to determine the agreement, and thereupon to take possession of the goods and to sell them. If upon a sale he should realize more than what was due to him under the agreement and his expenses, he was to pay the surplus to *W.*; if he should realize less, *W.* was to make good the deficiency. On the payment of the £170 and expenses the goods were to become the property of *W.*:—

*Held*, that these two documents together constituted a mortgage to secure £170, and that they required registration under the *Bills of Sale Act*, 1854.

*Thomson* v. *Barrett* (1), *Allsopp* v. *Day* (2), and *Byerley* v. *Prewost* (3), discussed and distinguished.

In August *W.* repaid *C.* £50, part of the £170. The balance of £120 was not paid when it became due on the 18th of September, and *C.* sent *H.* to take possession of the goods. Possession was taken, and it was then arranged that *H.* should pay the £120 to *C.* *C.* signed a receipt (indorsed on the hiring agreement of the 18th of July) and dated the 22nd of September, for the £120 as "for the absolute sale" to *H.* of "the goods herein specified," and on the same day an agreement (similar to that of the 18th of July) was entered into between *H.* and *W.* for the letting of the furniture to *W.* for three months at a rent of £145, to be paid in three instalments in October, November, and December. The October instalment was not paid when it became due, and on the 6th of November *H.* took formal possession of the goods. But the goods remained in the apparent possession of *W.* until after he had committed an act of bankruptcy, upon which he was ultimately adjudicated a bankrupt. None of the documents was registered under the *Bills of Sale Act*:—

*Held*, that, whether the transaction in September was a transfer to *H.* of *C.*'s interest as a mortgagee or an entirely new transaction, *H.* could stand in no better position than *C.* did, and that the trustee in the bankruptcy was entitled to the goods.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

In July, 1877, *J. B. Walden*, a stockjobber in the City of *London*, had an execution in his dwelling-house at *Wimbledon*. He applied to Mr. *A. S. Cochrane*, who traded as a banker under the name of the *National Deposit Bank*, to assist him to pay out the execution. On the 18th of July, 1877, two documents were executed. The first was an inventory of the furniture in *Walden's* house, and at the foot of it was a receipt, dated the 18th of July, and signed by *Walden*, as follows:—

"Received of Mr. *A. S. Cochrane* the sum of £150, for the

(1) 1 L. T. (N.S.) 268. (2) 7 H. & N. 457.
(3) Law Rep. 6 C. P. 144.

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absolute sale to him of the whole of the above-mentioned articles of furniture and other effects."

The other document was a memorandum of agreement, dated the 18th of July, and made between *Cochrane* of the one part, and *Walden* of the other part, which contained the following stipulations (*inter alia*):—

(1.) *Cochrane* agreed to let on hire to *Walden*, and *Walden* agreed to hire from *Cochrane*, the goods specified in the inventory thereto annexed for the term of two months from the day of the date of the agreement for the sum of £170, to be paid by *Walden* to *Cochrane* in manner following (that is to say), £170 on the 18th of September, 1877, or on such other extended days as might from time to time be agreed upon in writing between the parties until the whole of the £170 should be fully paid and satisfied.

(2.) In case the £170 should not be duly paid pursuant to clause 1, or if, at any time during the continuance of the agreement, the goods or any part thereof should be or become liable to be seized or distrained upon for rent or taxes, or under any execution against *Walden*, or if and in case *Walden* should, at any time whilst any money should remain due under the agreement, become bankrupt or file any petition for liquidation or composition of his affairs, or make any assignment for the benefit of his creditors, or permit or suffer any action, suit, or proceedings to be commenced and prosecuted, or any judgment for debt signed against him, or remove the goods or any part thereof from off his premises without the knowledge or consent of *Cochrane* first had and obtained in writing for any of the said purposes, it should be lawful for *Cochrane* at once to determine the agreement. And it was expressly agreed that it should thereupon be lawful for *Cochrane* to seize and remove the goods or any of them, and re-possess the same, and to remain in possession of them, without any further consent on the part of *Walden*.

(3.) If and in case *Cochrane* should so seize and re-possess himself of the goods or any part thereof, he should, if he should think fit, sell the goods so seized, and, if he should thereupon realize a larger amount of money than the sum that should be actually due to him under the agreement, together with all

expenses he might have incurred in relation to the said seizure, removal, and sale, and also all costs, charges, and expenses he might have incurred or have sustained in relation to the goods, or to the agreement, or in defending or sustaining his title to the goods under the agreement, then the balance of the amount so realized should be paid by *Cochrane* to *Walden*. But, if the goods so seized should realize a less sum than the money then actually due to *Cochrane*, together with all expenses as aforesaid, then *Walden* should pay to *Cochrane* the amount of any such deficiency, and, in default of payment thereof being made, the same should be recoverable against *Walden* by *Cochrane* in like manner as if the same were money actually due and owing.

(7.) When and so soon as *Walden* should have paid to *Cochrane* the full amount of the £170, together with all costs, charges, and expenses that might be payable under the agreement, then the goods should become and be the goods of *Walden*.

At the foot of this agreement was written an inventory of the goods comprised in it, which was a copy of the inventory to which the receipt for the £150 was attached.

Out of the £150 *Cochrane* paid the amount of the execution to the sheriff, and paid the balance to *Walden*. On the 10th of August, 1877, *Walden* repaid *Cochrane* £50 on account of the £170. On the 18th of September, 1877, the balance of £120 became due, and was not paid by *Walden*. *Cochrane* thereupon instructed Mr. *H. H. Wheatley*, an auctioneer, to take possession of the goods, and he did so. An arrangement was then made that *Wheatley* should pay *Cochrane* the £120, and this was done on the 22nd of September. A receipt, dated that day, was indorsed on the hiring agreement of the 18th of July, and was signed by *Cochrane*, as follows:—"Received of Mr. *H. H. Wheatley*, the sum of £120 for the absolute sale to him of the whole of the goods, chattels, and effects herein specified." And the same day an agreement for the letting of the furniture by *Wheatley* to *Walden* was entered into, in terms similar to the agreement of the 18th of July, with this difference, that the letting was to be for three months from the 22nd of September, for the sum of £145, to be paid in three instalments, on the 22nd of October, the 22nd of November, and the 22nd of December, 1877. None of the docu-

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ments of the 18th of July or of the 22nd of September was registered under the *Bills of Sale Act*. The instalment which became due in October was not paid by *Walden*, and *Wheatley* on the 6th of November put a man in possession of the goods. Shortly afterwards *Walden* filed a liquidation petition, and was ultimately adjudicated a bankrupt. The goods comprised in the agreements remained in his apparent possession until after the filing of the petition. In January, 1878, *Wheatley* sold the goods. The trustee in the bankruptcy claimed the proceeds of sale, on the ground that the documents of the 18th of July amounted to a bill of sale, and ought to have been registered. The Registrar held that registration was unnecessary, on the ground that the property in the goods passed by manual delivery, independently of the documents. The trustee appealed.

Argument.

*Marten*, Q.C., and *Warmington*, for the Appellant:—

The two documents of the 18th of July formed really one transaction—a mortgage—and therefore required registration, and so it has been recently decided by *Lindley*, J., in a case of *Cochrane* v. *Matthews* (1), where two precisely similar documents were exe-

(1) 1878. Mar. 22.

COCHRANE *v.* MATTHEWS.

LINDLEY, J., gave judgment as follows:—

I do not think it is necessary to look into the authorities any further.

I have come to the conclusion that these two documents ought to be regarded as one assurance. Now let us look at the substance of the matter before we look at it with reference to the language of the Act. I take Mr. *Cochrane's* evidence as perfectly trustworthy and as stating exactly what was intended. But what was intended? I shall not put it in his language, but to my mind it is quite plain from his evidence that it was not intended that he should buy this property with the view of keeping it, but that he should buy it and keep it locked up in his own name in order and with the view to render it a security to him for the money which he was advancing. That is to say, the form in which he proposed to do that was not to take an ordinary mortgage, but the particular machinery by which he desired to effect his intention was that he should acquire the property and re-demise it. That was the machinery. And I take it he is quite right in saying it was intended that the property should pass when the receipt was taken, but it passed to him on an agreement that he should re-demise it. In other words, before the money was paid the whole transaction was arranged that the property should be sold to him, and that he should pay £50. To my mind it is plain that *Cochrane* could not have stopped there and have claimed the property, without being guilty of a gross breach of faith.

cuted, the money being advanced by the same lender as in the present case.

Sects. 1, 2, and 7 of the *Bills of Sale Act*, 1854, apply: *Hale*

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It would have been a gross breach of faith to the borrower. He could not have carted away the property at the next moment. In this sense it was his property that he might re-demise it; in other words, it was his as a security for the money. That, of course, was not all set out and expressed in the receipt. But the receipt is not a pure receipt for £50; it follows an inventory; it is: "Received the sum of £50 for the absolute sale of the above-mentioned articles of furniture and other effects." Well, "absolute sale" is quite right in one sense, but it is not right in another sense. It was an absolute sale for the purpose of certain arrangements; it was not an absolute sale without conditions. I quite agree with Mr. *Lane* that I am not at liberty to hold these instruments void under the *Bills of Sale Act* simply because they have been drawn with the view of evading the Act. As I understand the law, any one is at liberty to evade an Act in one sense of the word, that is, he is at liberty to do things which are not hit by the Act, which do not come within the Act when properly construed. If the Act is so worded as to affect a certain transaction, anybody is at liberty to have recourse to other transactions which do not come within the Act. In that sense any one is at liberty to evade an Act. But we must look at the real and true construction of the Act. I am of opinion that this transaction is clearly within the language of the Act, as well as within what may be called its spirit. It appears to me that the evidence of Mr. *Cochrane* is conclusive upon this, that these two pieces of paper are portions of one transaction, and you cannot separate them as if they were unconnected with each other. They constitute one transaction just as much as if the two pieces of paper had been one piece of parchment. The mere fact that the one piece of parchment is divided into two documents, one in the form of a receipt and one in the form of a re-demise, cannot make them separate transactions. The two together shew what the transaction was. It would not have been fair to either of the parties to have fastened upon the one piece of paper without looking at the other. The true evidence of the one transaction is the two pieces of paper, and those two together form, in my opinion, one assurance of these chattels. Then, taking that view of the case, it falls within the exact words of the definition clause (sect. 7) of the *Bills of Sale Act*. It appears to me that is the true view of the case, that the two documents form one assurance within the meaning of sect. 7 of the Act.

Now with reference to the authorities —the only one to be considered is *Thomson* v. *Barrett* (1 L. T. (N.S.) 268). *Phillips* v. *Gibbons* (5 W. R. 527) supports the view which I take. Here no doubt there are two pieces of paper, but one cannot fritter it away by saying the transaction is to be regarded differently accordingly as part of it is on one piece of paper and part of it on another, or because one part may be on blue paper and another on white paper. That is a piece of the machinery; the two documents are so worded that they together form one transaction just as much as if they were on one piece of paper only. In *Thomson* v. *Barrett*

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v. *Saloon Omnibus Company* (1); *Phillips* v. *Gibbons* (2). *Cochrane* never became the absolute owner of the goods; there was nothing but a mortgage to him. The second transaction in September was nothing but a transfer by *Cochrane* to *Wheatley* of his rights as a mortgagee, and gave *Wheatley* no better title than *Cochrane* himself had. Or, if it was a new mortgage, it equally required registration. An assignment by the grantee of his interest under a bill of sale comes equally with the original bill of sale within the provision of 29 & 30 Vict. c. 96, s. 4, requiring re-registration after the expiration of five years: *Karet* v. *Kosher Meat Supply Association* (3). The goods always remained in the apparent possession of *Walden* until after the act of bankruptcy had been committed: *Ex parte Lewis* (4). *Thomson* v. *Barrett* (5) will probably be cited against us, but it is distinguishable. There a receipt was given for the purchase-money of a barge, and it was re-let by the purchaser to the vendor. But the purchaser's name was painted on the barge, and, moreover, the jury found that there was a *bonâ fide* sale, and that the document was not a record of the transaction in case the matter should be afterwards called in question, but a mere receipt for the purchase-money.

*E. C. Willis*, for *Wheatley*:—

On the 18th of July the sheriff was actually in possession and could have sold, and *Cochrane* found the money to get rid of him. The sale was in substance made by the sheriff to *Cochrane*. At any rate, there was an out and out purchase by *Cochrane*, though there was a simultaneous agreement by him to re-let the goods to *Walden*. If registration was necessary, which of the two docu-

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there was only one piece of paper, and the rest was all verbal. It was impossible to say, therefore, upon the true construction of it, that that one piece of paper was an assurance of anything. I do not see anything in *Thomson* v. *Barrett* inconsistent with the view I take, that the two documents in the present case ought to be construed and treated for all purposes as one, and that they cannot be treated as separate documents without doing that which would be contrary to the intention of both parties. It appears to me that this is an assurance within the *Bills of Sale Act*, and my judgment, therefore, must be for the Defendant.

(1) 4 Drew. 492.
(2) 5 W. R. 527.
(3) 2 Q. B. D. 361.
(4) Law Rep. 6 Ch. 626.
(5) 1 L. T. (N.S.) 268.

ments ought to have been registered, or should both have been registered? The mere fact that there was a right of redemption given to *Walden* makes no difference, for the Act requires that every bill of sale, absolute or conditional, should be registered. A mere receipt for purchase-money cannot require registration.

[JAMES, L.J.:—In *Evans* v. *Prothero* (1) it was held that an insufficiently stamped receipt for purchase-money might be received as evidence of a contract to purchase land.]

In *Thomson* v. *Barrett* (2), *Allsopp* v. *Day* (3), and *Byerley* v. *Prevost* (4), it was held that a mere receipt for the purchase-money of goods did not require registration under the Act. It has not been suggested that the hiring agreement required registration. It amounts to an admission by *Walden* that *Cochrane* was then the absolute owner of the goods; this admission binds *Walden's* trustee. The first document did not pass the property in the goods; it had already passed by delivery.

[THESIGER, L.J.:—The Act applies to documents which do not pass property.]

In *Allsopp* v. *Day*, *Wilde*, B., was disposed to think that a bill of sale means an instrument by which the property passes. In September *Cochrane* took possession of the goods, as he was entitled to do under the hiring agreement, and he had a full right to sell them. There is no evidence of any fraudulent arrangement between him and *Wheatley*. *Wheatley* bought the goods out and out, and *Walden* was cognisant of the transaction. *Wheatley* could only register his documents as against *Cochrane*, who is not a bankrupt. No doubt the only distinction between the present case and *Cochrane* v. *Matthews* (5) is the second purchase by *Wheatley*, but it does not appear from the judgment of Mr. Justice *Lindley* that either *Allsopp* v. *Day* or *Byerley* v. *Prevost* was cited to him.

*Marten*, in reply:—

In *Allsopp* v. *Day* the inventory did not form part of the receipt, as in the present case. The circumstances, too, were very different,

(1) 1 D. M. & G. 572.
(2) 1 L. T. (N.S.) 268.
(3) 7 H. & N. 457.
(4) Law Rep. 6 C. P. 144.
(5) *Ante*, p. 80, n.

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and moreover *Phillips* v. *Gibbons* (1) was not cited, and the special case on which the Court decided stated that there had been a previous purchase. But since then it has been held that a mere agreement for a bill of sale, if it is relied upon as an equitable assignment, must be registered: *Ex parte Mackay* (2); *Edwards* v. *Edwards* (3); *Brantom* v. *Griffits* (4).

*E. C. Willis*, in reply:—

In each of the cases last cited there was an equitable assignment in writing; not, as here, only a document which at the most is but evidence of a prior assignment.

Judgment, James, L.J.

JAMES, L.J.:—

I think on the whole that we must adopt the decision of Mr. Justice *Lindley*, and hold that the original document was a bill of sale within the meaning of the Act, and required registration. No doubt the case of *Allsopp* v. *Day* (5) is very strongly in favour of Mr. *Willis's* argument. There there was a receipt for purchase-money very much in the same words as here, only differing, I think, from the one before us in this respect, that the inventory of the goods was inclosed with it, and was not part and parcel of the same document as it is here. But there was also this difference, which Mr. *Marten* has pointed out, that the special case stated an actual purchase, and an actual payment of the purchase-money independently of the receipt, which was only added in the subsequent statement of the facts. I do not know whether those differences are very material, but if it is necessary, I am bound to state that I should not be prepared to affirm that decision. I cannot help thinking that one particular view of the case was not presented to the mind of the Court, and that is the view which is suggested by *Evans* v. *Prothero* (6), that is to say, whether such a document as this did not amount to something more than a receipt, whether it did not amount to a complete memorandum of agreement. Then, if this document—the receipt—in itself was not at law sufficient to transfer the property in the goods, it may

(1) 5 W. R. 527.
(2) Law Rep. 8 Ch. 643.
(3) 2 Ch. D. 291.
(4) 2 C. P. D. 212.
(5) 7 H. & N. 457.
(6) 1 D. M. & G. 572.

have been sufficient to shew that the one party was transferring, and the other receiving the goods. But, if it did not pass the property at law, beyond all question, in my view, it was sufficient to confer on the person to whom it was given, *i.e.*, Mr. *Cochrane*, a perfectly good equitable title to the goods, which title he could have enforced in equity if necessary, independently of the statute. The cases to which Mr. *Marten* referred as to the effect of equitable titles, had not been decided when *Allsopp* v. *Day* (1) was before the Court of Exchequer. I do not know, however, that it is necessary for the decision of the present case to deal with that point, because what we have got here is the evidence of two contemporaneous documents, both executed as part and parcel of the same transaction, as much contemporaneous as it is possible for two documents to be, and those two documents together constitute the real transaction between the parties. The real transaction which took place, as evidenced by the two documents now before us, was a bill of sale of goods for the purpose of securing a debt, the goods being in truth and in substance redeemable upon the payment of the debt with the interest thereby stipulated. The form adopted, a sale and a demise, seems to me to be wholly immaterial. The goods before the execution of the two documents were the goods of *Walden*. After the execution of the two documents they remained still in equity the goods of *Walden*, subject to a charge upon them for the money which was advanced by *Cochrane* by way of loan, and, it being advanced by way of loan, the goods were redeemable on the payment of the loan with interest. The two documents are the true record of the transaction, and they shew by themselves, without any other evidence, that the goods were originally *Walden's* goods, and that they became, either at law or in equity, by means of these two documents, *Cochrane's* goods, as mortgagee, but liable to be redeemed by *Walden*. The two documents, therefore, constitute, in fact, a bill of sale with a defeasance upon redemption. That being so, it appears to me that they are within the very words of the *Bills of Sale Act*, and required registration.

Then, was that original transaction affected by the subsequent transaction between *Cochrane* and *Wheatley?* Now there is no

(1) 7 H. & N. 457.

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evidence of any sale by *Cochrane* to *Wheatley* except the receipt for the purchase-money. I do not in the slightest degree doubt that the money passed, but there is no evidence of the passing of the goods from *Cochrane* to *Wheatley*, except the receipt. The receipt is, "Received of Mr. *H. H. Wheatley* the sum of £120 for the absolute sale to him of the whole of the goods." At the same time the letting agreement was handed over, and the receipt was indorsed on it. There was no sale by *Cochrane* under the power contained in the agreement. It was a mere payment by *Wheatley* of exactly the sum due to him, £120. There was a request made by *Walden* to *Wheatley* to do it, to take the thing off *Cochrane's* hands. That, in my opinion, was merely a transfer to *Wheatley* of *Cochrane's* rights as mortgagee, and *Wheatley* cannot put himself higher than *Cochrane* could have done. He is claiming through *Cochrane*, under *Cochrane's* bill of sale, which was not registered. The want of registration affects *Wheatley*, the assignee, exactly as it did *Cochrane*, the assignor, and as there was never any cesser of the apparent possession of *Walden* before the act of bankruptcy took place, the title to the goods is now as bad in *Wheatley* as it would have been in *Cochrane*. That being so, I am of opinion that the title of the trustee is good as against *Wheatley*, and therefore the order of the Registrar must be reversed, and an order made that the Respondent do pay the proceeds of sale to the trustee.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion. I think it convenient to consider the transactions of the 18th of July and the 22nd of September separately. I think it is impossible, having regard to all the circumstances, not to treat what took place on the 18th of July in effect as one transaction. Under what circumstances was that transaction entered into? *Walden* had an execution in his house, the sheriff was in possession, and he applied to *Cochrane* to free him from that execution. He asked him to pay out the amount of the execution, something like £106, and to advance him or pay him a further sum of money for his own purposes. Whereupon what took place was this: there was an apparent sale of the goods to *Cochrane* for £150. On the same day *Cochrane* let all this furniture to *Walden* for £170, not £150. He let it for two months, the money to be

paid at the expiration of the two months, or at such other time as should be agreed upon between the parties. The agreement then provides that, if that money is not paid, or if there is a liquidation petition by *Walden*, or a bankruptcy, or in the event of any of a variety of other circumstances, *Cochrane* shall have power to take possession of the furniture, and to sell it. Then there follows this remarkable provision, that, if the sale produces more than £170, *Walden* is to receive the surplus; but if, on the other hand, it does not produce the full amount of £170, *Walden* is to make up the difference to *Cochrane*. That is utterly inconsistent with a sale and letting as ordinarily understood. It is impossible to look at the transaction as anything else than a loan of £150 for two months, the additional £20 being interest for the money so borrowed. If that be the nature of the transaction, taken all together, I do not see that it makes any difference that it is contained in two documents instead of one. You cannot defeat the operation of the *Bills of Sale Act* by putting part of a transaction in one document and the other part in another document. Taken as a whole the transaction clearly falls within the provisions of the 1st and the 2nd section of the Act; the one requiring the registration of the bill of sale, and the other requiring the registration of the document containing the conditions or defeasance. Therefore both documents should have been registered as a bill of sale. Together they constitute a bill of sale with a defeasance.

Then what was the effect of the transaction of the 22nd of September? I must confess that I was at one time pressed with the view urged by Mr. *Willis*, that the right to exercise the power of sale had arisen, and that *Cochrane* exercised it, and that, he having done so and sold to *Wheatley*, *Wheatley's* title was established. But there again we must have regard to the transaction taken as a whole. If there had been no re-letting by *Wheatley* to *Walden*, there might have been perhaps some ground for the contention of Mr. *Willis*. But you find that on the same day, directly the transfer of the goods is made to *Wheatley* by *Cochrane*, *Wheatley* enters into another letting agreement with *Walden*, again on a further advance, representing it as a letting for three months, and that the amount is to be paid again by instalments. Surely that must have been a matter of arrangement

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between not only *Cochrane* and *Wheatley*, but between *Cochrane*, *Wheatley*, and *Walden*. Between the three, was it anything more than a transfer to *Wheatley* of the security which *Cochrane* previously held? I think, therefore, that the transaction of the 22nd of September did not introduce any fresh element. I entirely agree with the Lord Justice that it is really immaterial whether the transaction of the 18th of July created a legal or an equitable title in *Cochrane;* in either view registration was required.

Judgment, Baggallay, L.J.

Now with regard to the case of *Allsopp* v. *Day* (1), without for a moment wishing to suggest that my own views at all differ from what was laid down by the learned Judges in that case, I think that this is to be observed—the case was a very special one; the receipt was simply given for a sum of money paid as the purchase-money for a certain property, which, not by virtue of the transaction then entered into, but by virtue of the provisions of a deed of settlement executed eight months previously, the trustees had an authority to buy. Therefore, there being authority to buy this furniture under the original deed of settlement, some eight months afterwards they buy it, and then a receipt is given simply for the purchase-money. No transaction was coupled with it such as was coupled with the receipt given in the present case. In *Thomson* v. *Barrett* (2) the transaction was certainly very distinct from that with which we are dealing here. There the property was sold out and out. There was, no doubt, a verbal collateral promise by the purchaser, "If you pay me what I have given for it, I will give the property back to you." But there was no obligation on the person to whom that promise was made, that if the property was sold and it did not realize that amount, he would make up the difference. Not only was it a purchase made in that form, but there was an actual transfer of the possession of the barge to *Thomson*, his name was painted on it, and it was forthwith his. It appears to me that the order which the Lord Justice has suggested is the right one.

Thesiger, L.J.

THESIGER, L.J.:—

The first question which we have to determine is this, whether the transaction of the 18th of July was within the *Bills of Sale*

(1) 7 H. & N. 457. (2) 1 L. T. (N.S.) 268.

*Act.* In other words, whether the documents which evidenced that transaction were such as required registration under the Act. I am of opinion that the transaction was within the Act, and that those documents did require registration. It is important to observe what are really the facts of this case as compared with those of the cases which have been cited as being opposed to the conclusion at which we have arrived. In the present case there is no evidence of any agreement or arrangement between the parties apart from the documents upon which the question arises; but we have simply to look at the documents themselves, and to see whether or not they constitute a bill of sale within the meaning of the Act. Now, in the first place, if the matter stood simply upon what has been called the receipt, I should be disposed to think that that was an assurance of the property, a bill of sale requiring registration. No doubt it is in form a receipt; but, as was pointed out in *Evans* v. *Prothero* (1), a document which is in form a receipt may at the same time constitute an agreement, and if it were necessary to decide the case simply upon that ground, I should be of opinion in this case, as the Court was in *Evans* v. *Prothero*, that this document, in form a receipt, was also an agreement and an assurance of the goods in question. But it is not absolutely necessary to decide that point here, because the receipt is not the only document. We have as a contemporaneous document, clearly forming part of the same transaction, the other document called the letting agreement; and I cannot conceive there being any reasonable doubt, when the two documents are read together, that the transaction was, as evidenced by the documents themselves, a sale subject to a condition or defeasance under which, upon payment of money, which is called rent, within a certain time, the person originally granting or assigning the goods would be entitled to redeem them. In other words, it was a conditional sale, or mortgage of the chattels which were the subject of the sale. Upon that point we have an authority in a case exactly similar, the decision being founded upon precisely similar documents to those which we have now before us—the decision, I mean, of Mr. Justice *Lindley* in *Cochrane* v. *Matthews* (2); and, without going further into the matter,

(1) 1 D. M. & G. 572. (2) *Ante*, p. 80, n.

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Judgment, Thesiger, L.J.

I will only refer to the observations made by Mr. Justice *Lindley* in that case, and adopt them as part of my judgment.

But it is said on the other hand that there have been two or three cases decided which are contrary to the views expressed by Mr. Justice *Lindley*, and to the decision at which we are arriving. I do not think it necessary to decide or discuss whether or not those cases were properly decided, because in my view they are fairly distinguishable from the present case, looking at the facts to which I have already adverted. The first case is *Thomson* v. *Barrett* (1). There moneys had been advanced, two sums amounting to £75, and it was proposed that a further sum of money to the amount of £20 should be advanced, and a verbal agreement was come to to the effect that, upon the £20 being advanced, a certain barge should be sold by the borrower to the lender. But, at the same time, as part of that verbal agreement, there was a letting of the barge by the purchaser to the vendor, and a power for him to re-purchase the barge, if he so thought proper. After that verbal arrangement had been come to, a part of the transaction was put into writing in the form of a receipt—not a receipt for the whole purchase-money and setting out the whole transaction between the parties—but merely a receipt for the £20, the balance of the purchase-money; and, when the case came to be tried, the jury were distinctly asked to say whether that receipt was, as it purported to be, a mere receipt, or whether it was intended by the parties to be a record of the transaction in case the matter should be afterwards called in question. The jury found that it was a mere receipt, and *Cockburn*, C.J., in his judgment, comments upon that fact, and makes it a portion of the argument which leads him to the conclusion at which he arrives. *Crompton*, J., also says, "the jury having found that this document was not a record of the transaction, it does not require to be registered." Therefore you have two circumstances distinguishing that case from the present, namely, first, that there was a verbal arrangement, a complete agreement, apart from the document in the form of a receipt, and which was found by the jury to be a mere receipt; and, secondly, that the whole of the transaction was not reduced to writing, but only a receipt for a portion of the purchase-money. The next case

(1) 1 L. T. (N.S.) 268.

referred to was *Allsopp* v. *Day* (1). There the circumstances were these. There were trustees under a post-nuptial settlement. They had a power to lay out part of the trust funds in the purchase of furniture for the benefit of the wife and the husband. They, by the direction of the wife, who was a party to the settlement, arranged to purchase the husband's furniture, and the furniture was afterwards left in her possession and in the possession of her husband. The special case upon which the decision proceeded found as a fact that there was an arrangement for the purchase separate from the document, which was relied upon as not being within the *Bills of Sale Act*, that document being, as in *Thomson* v. *Barrett* (2), in the form of a receipt. Therefore, here again we have that same distinction to which I have referred, namely, an agreement—a verbal agreement—therefore not coming within the *Bills of Sale Act*—and then a receipt given, not as a record of the transaction, but, as it purported to be, a mere receipt of purchase-money paid under the arrangement between the parties. The third case is *Byerley* v. *Prevost* (3), and it partakes of the circumstances of the other two. There was first a verbal arrangement for a purchase, then a verbal arrangement for the re-letting of the goods, and then there was a simple receipt for the purchase-money. As I have already observed, it is not absolutely necessary to say whether those cases were rightly decided; but I must add that, if on any future occasion circumstances should arise identical with those in *Allsopp* v. *Day*, *Byerley* v. *Prevost*, and *Thomson* v. *Barrett*—at all events the first two—I think it would be very desirable that those cases should receive further discussion and consideration.

Now, that being the position as regards the original transaction of the 18th of July, we have to consider what is the effect of the transaction of the 22nd of September. It seems to me that that transaction must have been one of two things—either it was a simple transfer by *Cochrane* to *Wheatley* of his rights, or it was an entirely new transaction. If it was a simple transfer by *Cochrane*, then, if our view of the original transaction is correct, inasmuch as *Cochrane* never took apparent possession of the goods,

(1) 7 H. & N. 457. (2) 1 L. T. (N.S.) 268.
(3) Law Rep. 6 C. P. 144.

C. A. 1878

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Judgment, Thesiger, L.J.

he could convey no greater right than he himself had. He would have had no right as against the trustee if the bankruptcy had then occurred, because the apparent possession was left in the hands of *Walden*, and consequently *Wheatley's* title would be liable to the same objection. On the other hand, if it were a new transaction, what was the purport of it? Surely nothing more than a repetition of the original transaction of the 18th of July. Practically it amounted to this—that *Walden* had still a title, equitable or otherwise, to the goods. The arrangement between the parties seems to have been this, that *Cochrane* should give up his rights on the payment of £120, and that a new arrangement, to which both *Wheatley* and *Walden* were parties, should be entered into, that arrangement being identical in its terms and substance with the arrangement of the 18th of July, namely, an arrangement by which the goods should become the property of *Wheatley*, but subject to a condition of redemption on the terms contained in the contemporaneous document. There again the whole transaction is shewn by the two documents. The two documents constitute one assurance; and, just as the original assurance of the 18th of July required registration, so in my opinion—assuming that it was a new transaction and not a mere transfer by *Cochrane*—the assurance of the 22nd of September required registration.

Solicitors for Trustee: *Yarde & Loader.*
Solicitors for Respondent: *Dillon-Webb, Kelly, & Co.*

## *In re* CURRIE (A PERSON OF UNSOUND MIND).

C A.
1878
Nov. 23.

*Lunacy—Vesting Order—Trustee Act*, 1850, *s.* 5.

The sole surviving trustee of a sum of stock under a settlement having become of unsound mind, the persons beneficially entitled presented a petition in Lunacy for an order vesting in them the right to transfer the stock and receive the dividends:—

*Held*, that such an order ought not to be made, as it would be administering the trust in Lunacy; but, on the petition being amended and intituled in the Chancery Division as well as in Lunacy, an order was made appointing the Petitioners trustees of the settlement, and vesting in them, as such, the right to transfer the stock and receive the dividends.

Statement.

UNDER a marriage settlement dated the 13th of July, 1827, a sum of £10,000 consols was vested in three trustees upon trust for Mr. *Currie* for life or until his bankruptcy, insolvency, or attempt to alien, and after the determination of that trust, upon trust for Mrs. *Currie* for life, and, subject to those interests, upon trusts for the children of the marriage, and if no child should acquire a vested interest, then upon trust for Mr. *Currie* absolutely. Under the same settlement a sum of £2860 New £3 per Cent. Annuities was vested in the same trustees upon the same trusts, except that the ultimate trust was for Mrs. *Currie*. There never was any issue of the marriage. Mr. *Currie* died in 1873, leaving a will by which he appointed Mrs. *Currie*, *E. H. Currie*, and *F. L. Soames* his executors, and bequeathed his residuary personal estate to Mrs. *Currie* absolutely.

The surviving trustee of the settlement was of unsound mind, not so found by inquisition.

This petition was presented in Lunacy by Mrs. *Currie*, *E. H. Currie*, and *F. L. Soames*, asking that the right to transfer the £2860 New £3 per Cent. Annuities and to receive the dividends due or to accrue due thereon might vest in Mrs. *Currie* for her own benefit, and that the right to transfer the £10,000 consols and to receive the dividends due or to accrue due thereon might vest in the three Petitioners as the legal personal representatives of Mr. *Currie*.

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*Ingle Joyce*, for the Petitioners, referred to the *Trustee Act*, 1850, s. 5, *Ex parte Bradshaw* (1), and *In re White* (2).

Judgment, James, L.J.

JAMES, L.J.:—

You are asking us to administer a trust in Lunacy, which it is our settled rule never to do. We therefore cannot make the order asked. But as affidavits have been made shewing that the Petitioners are proper persons to be appointed new trustees, we can make an order appointing them new trustees of the settlement, and vesting the right to transfer the funds in them as such trustees upon the petition being amended for that purpose and intituled in the Chancery Division as well as in Lunacy.

Baggallay and Thesiger, L.JJ.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitor: *F. L. Soames.*

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C. A.

## *Ex parte* MUSGRAVE. *In re* WOOD.

1878
C. J. B.
*July* 29.

*Court of Bankruptcy — Jurisdiction — Money Demand by Trustee against Stranger to Bankruptcy—Mutual Accounts—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 72.

C. A.
*Dec.* 5.

A liquidating debtor had consigned goods to commission merchants for sale, and they had made advances to him. They alleged that a balance was due to them from his estate, and the trustee in the liquidation alleged that a balance was due from them to the estate. They had not, however, tendered any proof or made any formal claim against the estate :—

*Held*, by the Chief Judge and by the Court of Appeal, that, inasmuch as, if the trustee was right, there was a mere money demand by him against a stranger to the liquidation, the Court of Bankruptcy ought not, on the application of the trustee, to order accounts to be taken of the dealings between the debtor and the commission merchants; but that the trustee ought to proceed by action in the High Court.

*Ex parte Dickin* (3) followed.

Statement.

ON the 21st of February, 1878, *W. H. Wood*, a stuff merchant at *Bradford*, filed a liquidation petition in the *Bradford* County

(1) 2 D. M. & G. 900. (2) Law Rep. 5 Ch. 698.
(3) 8 Ch. D. 377.

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*Ex parte* MUSGRAVE. *In re* WOOD.

Statement.

Court. The creditors resolved upon a liquidation by arrangement, and appointed *Benjamin Musgrave* trustee. The debtor had had various business transactions with Messrs. *Schumann Brothers*, commission merchants at *Leeds*, borrowing money from them upon goods which he consigned to them for sale. They alleged that upon the taking of an account of these transactions a balance would be found due from the debtor's estate to them. The trustee, on the other hand, alleged that a balance was due from them to the debtor's estate. On the 30th of April, 1878, the trustee gave notice of an application to the Court that an account might be taken of what was due or might become due from the debtor's estate to *Schumann Brothers* in respect of moneys advanced by them to or on account of the debtor, and in respect of bills accepted or indorsed or handed over by them for or to the debtor; that an account might be taken of all moneys received or which might have been received by the firm of *Schumann Brothers*, or by either partner therein, in respect of goods of the debtor which had come into the hands of the firm or of either partner therein; and that the firm might be ordered to pay to the trustee the balance found due from them. *Schumann Brothers* had not tendered any proof or made any formal claim against the debtor's estate. On the 7th of May the Judge (Mr. *Daniel*, Q.C.,) made an order directing the accounts asked for to be taken, and adjourned the further hearing of the motion until the taking of the accounts should have been completed. The taking of the accounts was proceeded with subsequently on several occasions before the Judge himself, and evidence was gone into at considerable length. No objection had been raised to the jurisdiction. On the 18th of June the matter came again before the Court. Meanwhile the Judge had seen a report of the decision of the Court of Appeal in *Ex parte Dickin* (1). He was of opinion that the result of that decision was that he had no jurisdiction to make the order of the 7th of May, and he accordingly made an order that "the Court being of opinion that the account directed by the order of the 7th of May when taken would, as against the Respondents, according to the claim of the trustee, resolve itself into a mere money demand enforceable in the High Court of Justice, and having regard

(1) 8 Ch. D. 377.

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to the judgment of the Court of Appeal in *Ex parte Dickin* (1), the Court doth declare that it does not consider itself empowered to exercise jurisdiction in the matter of this application, and therefore discharges the order of the 7th of May last, and refuses the original motion without costs." The trustee appealed to the Chief Judge. The appeal was heard on the 29th of July, 1878.

Argument.

*De Gex*, Q.C., and *Phear*, for the Appellant:—

*Ex parte Dickin* does not apply. This is not a simple case, as it was there, of a money demand by the trustee against a stranger to the bankruptcy. The Respondents allege that a balance is due to them, and for that they would be entitled to prove against the estate. If they should carry in a proof these accounts would have to be taken in the Court of Bankruptcy. In such a case sect. 72 gives the Court of Bankruptcy jurisdiction to take the accounts on the application of the trustee. *Ex parte Anderson* (2), *Ex parte Cohen* (3), and *Ex parte Ditton* (4), shew how fully the jurisdiction has been recognised by the Court of Appeal. *Ex parte Dickin* was nothing more than a decision that, under the particular circumstances of that case, it was not expedient to exercise the jurisdiction. In the present case complete justice can only be done in the Court of Bankruptcy. Moreover, the Respondents have in effect submitted to the jurisdiction. They did not raise the objection; it was taken by the Judge *mero motu*.

*Northmore Lawrence*, for the Respondents, was not heard.

Judgment, C. J. B.

BACON, C.J.:—

The decision of the Court of Appeal in *Ex parte Dickin* has, no doubt, caused some surprise. Sect. 72 has been acted upon for some years, and it was thought that it was the intention of the Legislature to give the Court of Bankruptcy a power which it did not before possess, of dealing with such a subject as this, and no doubt *Ex parte Anderson* and other cases which have been referred to were decided on that footing. But Mr. *De Gex* did

(1) 8 Ch. D. 377.
(2) Law Rep. 5 Ch. 473.
(3) Law Rep. 7 Ch. 20.
(4) 1 Ch. D. 557.

not refer to one very important exception, the case of *Ellis* v. *Silber* (1), in which a different view was taken of the jurisdiction. The decision of the Court of Appeal in *Ex parte Dickin* (2) is perfectly plain and distinct, without any possibility of doubt. In that case, no doubt, a question was raised with regard to *Ex parte Waring* (3), and it was also suggested that there had been misconduct on the part of factors in not keeping their principals' property separate from their own, and no such questions arise in the present case. In the present case there is simply a question between two commercial firms, who occupied the position of debtor and creditor. In the result of their dealings there must be a balance one way or the other; in other words, a debt on the one side or the other. The case, therefore, comes most distinctly within the decision in *Ex parte Dickin*, which was, as the Master of the Rolls expressed it, that (4) "whenever there is a simple money demand by the trustee of a bankrupt's property, which is capable of being tried by the ordinary tribunals, I can see no reason why the Court of Bankruptcy should assume jurisdiction to try it." To my mind, no words can express more distinctly the opinion of his Lordship that the Court of Bankruptcy has no jurisdiction to try the simple question whether *A.* shall pay to *B.* or *B.* to *A.* a certain balance. Nor can I find any difference in the judgments of the two other Judges. The first part of the judgment of Lord Justice *James* referred to the case of *Ex parte Waring*, and the rest to the interpretation which he gave to the words in sect. 72, "which the Court may think it expedient or necessary to decide;" those words, he thought, being introduced because the Legislature thought they could trust the Court of Bankruptcy not to exercise the jurisdiction unless it was really expedient to withdraw the case from the ordinary tribunals of the country. And he thought it was not expedient to do so in the case of a mere money demand. Neither *Ex parte Cohen* (5) nor *Ex parte Ditton* (6) is in favour of the present appeal. What was the learned County Court Judge to do? In the first place, he took the view which has since been held to be erroneous, and

(1) Law Rep. 8 Ch. 83.
(2) 8 Ch. D. 377.
(3) 19 Ves. 345.
(4) 8 Ch. D. 387.
(5) Law Rep. 7 Ch. 20.
(6) 1 Ch. D. 557.

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Judgment, C. J. B.

conceived that it was in his power to try the question as if it was a suit in the Court of Chancery, in which the trustee was Plaintiff and the Respondents Defendants; and he ordered an account to be taken, with the intention of afterwards making an order for payment of the balance to whomsoever it should be found due. When the account had been partly taken, and the matter came before him again, he found that the Court of Appeal had decided that, where there was a mere money demand by the trustee, the Court of Bankruptcy ought not to make an order for payment, and he thereupon very wisely stayed his hand and proceeded no further with the case. If any balance is due to the trustee, his proper remedy is to bring an action for it. The plain duty of every Court is to adopt and obey the construction which has been put upon an Act by the Court of Appeal; and, in my opinion, the learned Judge was quite right in supposing that he had no jurisdiction to make such an order. If the decision in *Ex parte Dickin* (1) had been brought to his attention sooner, probably he would not have troubled himself to take the account, as it was not expedient that such a case should be investigated in the Court of Bankruptcy, but it ought to be tried in the High Court. I am unable to say that the learned Judge was wrong. If I had been in his place I should have done the same thing. I dismiss the appeal, but I shall give no costs.

C. A. From this decision the trustee appealed. The appeal was heard on the 5th of December.

Argument. *De Gex*, Q.C., and *Phear*, for the Appellant, repeated the arguments which they had addressed to the Chief Judge, and referred to the same cases, and also to *Ex parte Warren* (2).

*Northmore Lawrence*, for the Respondents, was not heard.

Judgment, C. A. James, L.J. JAMES, L.J.:—

I think that this case is incapable of being distinguished from *Ex parte Dickin*. There is a simple money demand by the trustee on behalf of the debtor's estate, and the principle of that

(1) 8 Ch. D. 377. (2) Law Rep. 10 Ch. 222.

decision is, that a man who is merely said to be a debtor to the estate of a bankrupt cannot be brought compulsorily into the Court of Bankruptcy. It was not intended that the Court of Bankruptcy should try every bill of a tradesman who happens to be a bankrupt. The case is really the same as *Ex parte Dickin* (1), which is a decision of this Court, and is binding upon us.

Judgment, C. A. Baggallay, L.J.

BAGGALLAY, L.J., concurred.

Thesiger, L.J.

THESIGER, L.J.:—

It seems to me that our decision in the present case is a direct consequence from that in *Ex parte Dickin*. Here the trustee himself started the proceedings for the express purpose of shewing that he had a money demand against the Respondents. If a trustee in bankruptcy cannot enforce a money demand in the Court of Bankruptcy, it seems to me to follow that he cannot institute a proceeding to have an account taken which he says will result in shewing that he has such a demand.

Appeal dismissed with costs.

Solicitors for Trustee: *W. & J. Flower & Nussey*, agents for *Wood, Killick, & Hutton, Bradford.*

Solicitors for Respondents: *Torr & Co.*, agents for *B. C. Pullan, Leeds.*

(1) 8 Ch. D. 377.

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## *Ex parte* BROOK. *In re* ROBERTS.

*Leasehold Interest of Bankrupt—Disclaimer by Trustee—Previous Severance of Tenant's Fixtures—Rights of Landlord—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23, 125.

The effect of a disclaimer by the trustee in a liquidation of a lease vested in the debtor is to place the trustee in the position of never having had any estate in the leasehold property.

Consequently, any severance by the trustee of the fixtures attached to the property after the date at which the term is put an end to by the disclaimer, *i.e.*, the date of the trustee's appointment, is necessarily a wrongful act, and gives the landlord a right to recover the value of the fixtures from the trustee.

Decision of *Bacon*, C.J., reversed.

Whether, after severing the fixtures, the trustee has any right to disclaim the lease, *quære*.

But at any rate he cannot as against the landlord assert the invalidity of his own disclaimer.

Statement.

ON the 10th of June, 1874, an agreement in writing was entered into between *James Brook & Sons* and *James Roberts*, a card maker, by which they agreed to let and he agreed to take a room in their premises called *Providence Mill*, in *Southgate, Elland*, as their tenant for one year from the date thereof, and so on from year to year until the tenancy should be determined on either side by a six months' notice to quit. The rent was to be £40 per annum. The lessors were to supply steam power to the room, to enable the lessee to run a steam engine turning the card setting machines attached thereto from 6 A.M. to 9 P.M. daily. And it was agreed that *Roberts*, his executors, administrators, and assigns, should and would, from time to time during the period that he or they should continue to occupy the room under the agreement, keep repaired at his or their own expense all the windows, doors, locks, fastenings, and all other fixtures in, upon, or belonging to the room, and leave the same in as good repair and condition as they were then in, reasonable wear and tear and accidents by fire only excepted. *Roberts* entered into possession under this agreement, and continued tenant of the room until the 24th of January, 1878, when he filed a liquidation petition in the *Halifax* County Court.

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The same day *Frederick Foster* was appointed receiver of the debtor's property and manager of his business, and he carried on the business until the first meeting of the creditors on the 11th of February, 1878, when a liquidation by arrangement was resolved upon, and *Foster* was appointed trustee. *Foster* continued to carry on the business up to the 19th of February, 1878, up to which time *Brook & Sons* continued to supply steam power under their agreement. The debtor had erected various trade fixtures in the room, and on the 9th of March, 1878, the trustee advertised these fixtures for sale by auction on the 13th of March. On the 11th of March *Brook & Sons* served a notice in writing on the trustee, requiring him to decide within twenty-eight days whether he would disclaim the demised premises or not. On the 13th of March the fixtures were sold by auction. *Brook & Sons* attended at the sale and bought some of the property. The proceeds of the sale were afterwards received by the trustee, and the fixtures, with the exception of those which *Brook & Sons* had bought, were severed and removed by the respective purchasers. On the 27th of March, 1878, the trustee executed a written disclaimer of the demised premises, and sent it to *Brook & Sons*, with the key of the premises. The trustee had not previously obtained the leave of the Court to disclaim, in accordance with rule 28 of the Bankruptcy Rules, 1871, but *Brook & Sons* accepted the disclaimer and the key. On the 18th of June they applied to the Court for an order that the trustee should pay over to them the proceeds of the sale of the fixtures, and the Judge ordered this to be done. His Honour was of opinion that the case was governed by the decision of the Court of Appeal in *Ex parte Stephens* (1), and that, as the disclaimer, when executed, determined the lease as from the date of the trustee's appointment, the fixtures became the property of the lessors, and the trustee had no right to remove them. The trustee appealed to the Chief Judge.

Statement.

The appeal was heard on the 29th of July, 1878.

*Winslow*, Q.C., and *Beaumont*, for the Appellant :—

Argument.

*Ex parte Stephens* does not apply to the present case. There the trustee severed the fixtures after he had executed a disclaimer.

(1) 7 Ch. D. 127.

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In the present case the severance was before the execution of the disclaimer. No doubt the disclaimer, when executed, operates as a surrender of the lease at the date of the appointment of the trustee, but the period between that date and the execution of the disclaimer is an "excrescence" on the term during which the trustee had still a right to consider himself in possession as tenant: *Minshall* v. *Lloyd* (1); *Mackintosh* v. *Trotter* (2); *Weeton* v. *Woodcock* (3).

The disclaimer does not invalidate what the trustee has rightly done while he was in possession. If the decision is right, a trustee could never execute a disclaimer of leasehold property in which there was valuable machinery, for he would be simply making a present of it to the landlord.

[They were stopped by the Court.]

*Finlay Knight*, for the landlord:—

The principle of *Ex parte Stephens* (4) applies, and it concludes this case. The surrender operates as a surrender of every interest which the tenant takes under the lease. The right to remove fixtures is connected with the term, and must be exercised during its continuance or within a reasonable time afterwards. The words of the Act are plain. The trustee need not sever the fixtures until he has made up his mind about disclaiming.

Judgment, C. J. B.

BACON, C.J.:—

There never has been—at least of late years—any doubt about the law on this subject; it was settled, I think, even before the case of *Minshall* v. *Lloyd* (5). As between lessor and lessee, the latter has a certain time after the expiration of his term within which he may remove the fixtures. It has been held that it must be a reasonable time, and what is a reasonable time must be decided with reference to the circumstances of each particular case. In this case, before there was any talk about a disclaimer, the trustee exercised his clear legal right of advertising the fixtures for sale. Two days afterwards the landlord gave him notice to decide within

(1) 2 M. & W. 450.
(2) 3 M. & W. 184.
(3) 7 M. & W. 14.
(4) 7 Ch. D. 127.
(5) 2 M. & W. 450.

twenty-eight days whether he would disclaim the lease or not. Within that period of twenty-eight days, if he did not previously disclaim, the trustee had a perfect right to sever the fixtures. Till the end of that time, or until a prior disclaimer, it could not be said whether there would be any determination of the lease. Within the twenty-eight days the trustee exercised his right of selling the fixtures, and afterwards he complied with the request of the landlord and executed a disclaimer of the lease. He sent the key of the premises to the landlord, and the landlord accepted it. What has *Ex parte Stephens* (1) to do with a case like this? There the severance of the fixtures was an unlawful act, for the disclaimer had been previously executed. Here the lease had not come to an end till the disclaimer had been executed, though when it was executed it related back to an earlier period. The notice to disclaim within twenty-eight days operated as a license by the lessor to the trustee to retain possession of the premises for that period, and of course it carried with it a right to exercise all the rights of a lessee. The trustee had a right to sell the fixtures within the twenty-eight days, unless he disclaimed before, and he cannot afterwards undo what he has done. It would be an utter perversion of the language of the statute to hold that, because the disclaimer, when executed, relates back by operation of law to the time of the appointment of the trustee, everything done between its execution and the appointment of the trustee is to be overhauled. The order of the County Court must be discharged, with costs.

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From this decision *Brook & Sons* appealed. The appeal was heard on the 5th of December, 1878.

C. A.

*De Gex*, Q.C., and *Finlay Knight*, for the Appellants:—

Argument.

The *ratio decidendi* of *Ex parte Stephens* exactly applies to this case. The trustee was not, during the period between his own appointment and the execution of the disclaimer, in possession of the property, "under a right still to consider himself as tenant," within the meaning of *Weeton* v. *Woodcock* (2). That period cannot be called an "excrescence" on the term, to use the

(1) 7 Ch. D. 127. (2) 7 M. & W. 14.

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language of *Parke*, B., in *Mackintosh* v. *Trotter* (1). By virtue of sects. 23 and 125 of the Act, the effect of the disclaimer is the same as if an actual surrender of the lease had been executed at the date of the trustee's appointment. Here the fixtures were removed a month after the appointment of the trustee; that cannot even be called a reasonable time. The right to remove fixtures is the right of a tenant; when the trustee declines to be tenant he loses that right. He remained in possession of the property for the purpose of making up his mind whether he would be tenant or not.

[JAMES, L.J.:—I should be glad to see in the Act a provision that, if the trustee chose to remove the fixtures in this way, he should be estopped from afterwards disclaiming.]

In *Saint* v. *Pilley* (2) *Amphlett*, B., intimated an opinion that the trustee in a liquidation, after selling the fixtures, could not disclaim the lease. But that was only a *dictum;* the case only decides that a trustee who sells fixtures cannot, by a subsequent surrender of the lease, defeat the title of the purchaser. In the present case the question is as to the trustee's own right, and if the term is gone there can be no rights springing out of it.

[They were stopped by the Court.]

*Winslow*, Q.C., and *Beaumont*, for the trustee:—

The consequences of allowing this appeal would be very serious. The object of sect. 23 was to enable the trustee to get rid of a burdensome lease; if the Appellants are right, he cannot do this without in many cases sacrificing very valuable machinery. *Ex parte Stephens* (3) does not apply, for there the disclaimer had been executed before the trustee removed the fixtures. A trustee may, by virtue of sect. 23, disclaim at any time, even if he has paid rent for the property, which would make him tenant under the lease.

[JAMES, L.J.:—Suppose an action is brought against him by the landlord, and he disclaims afterwards?]

The disclaimer could not affect a vested right of action for

(1) 3 M. & W. 184. (2) Law Rep. 10 Ex. 137.
(3) 7 Ch. D. 127.

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breach of covenant: *Saint* v. *Pilley* (1). The lease is vested in the trustee until he disclaims.

[JAMES, L.J.:—I think it is *in græmio legis*.]

It is part of the bankrupt's property which vests in the trustee on his appointment, and vests in him as from the date of the act of bankruptcy to which the adjudication relates back: sect. 11. For the period between the act of bankruptcy and the adjudication or the appointment of the trustee the lease must be vested in the trustee. The trustee is liable to pay rent until he disclaims. The tenant's right to remove fixtures is illustrated by *Minshall* v. *Lloyd* (2); *Mackintosh* v. *Trotter* (3); *Weeton* v. *Woodcock* (4).

[JAMES, L.J.:—Is there any decided case applying to a voluntary surrender by the tenant?]

No. Under the Bankruptcy Act of 1849 a lease of the bankrupt did not vest in the assignee until he had done some act to accept it; after he had done such an act he could only get rid of his liability by assigning the lease to a pauper. Under the present Bankruptcy Act the lease vests in the trustee on his appointment, without any act of his own; and he is in the same position as if under the old law he had accepted the lease, that is, he takes it as an assign. If by his subsequent disclaimer the term is gone for all purposes as from the date of his appointment, he could sue the landlord for rent which he had himself paid. If there had been an actual voluntary surrender, and the landlord had afterwards allowed the tenant to remain in possession, surely he would have had a right to remove the fixtures. The fixtures were by relation the property of the trustee up to the date of his own appointment, and after that he is entitled to a reasonable time within which to remove them. A month is not an unreasonable time: *Stansfeld* v. *Mayor, &c., of Portsmouth* (5). For some purpose or other the trustee had a right to remain in possession till he disclaimed.

[BAGGALLAY, L.J.:—Does not a surrender deprive the landlord of his right to accruing rent?]

If so, sect. 24 gives him a right to prove for damages in the

(1) Law Rep. 10 Ex. 137.
(2) 2 M. & W. 450.
(3) 3 M. & W. 184.
(4) 7 M. & W. 14.
(5) 4 C. B. (N.S.) 120.

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bankruptcy. The disclaimer cannot, however, relieve the trustee from liability in respect of rent accrued due down to the date of the disclaimer. It does not divest a vested right of action: *Smyth* v. *North* (1).

[THESIGER, L.J.:—That case only decided that the original lessee remained liable on his covenant.]

But *Bramwell*, B., says (2), "The words are, no doubt, that the lease is to be deemed to have been surrendered from the date of the order of adjudication; but this must, perhaps, be taken to mean, so as not to give rise to any fresh rights or liabilities as between the landlord and the bankrupt, not for all purposes."

[THESIGER, L.J.:—*Martin*, B., said (3) that sect. 23 did not apply to the case at all.]

In the present case the trustee tendered the rent due up to the time of the disclaimer. A voluntary surrender of a lease does not affect the rights of a third party, *e.g.*, an equitable mortgagee of the lessee: *Saint* v. *Pilley* (4); therefore the lease remains in existence for some purposes. *Penton* v. *Robart* (5) shews that a tenant who is in possession after the expiration of his lease may remove trade fixtures. Such fixtures are really chattels, and are not affected by a surrender: *Parsons* v. *Hind* (6).

[THESIGER, L.J.:—If so, they ought not to be called fixtures. But it was admitted in the County Court that the articles in dispute were tenants' fixtures.]

When the trustee removed the fixtures he was acting lawfully.

[JAMES, L.J.:—It was his own subsequent act which made the removal unlawful.]

The disclaimer cannot override what had been previously lawfully done. And in this case the landlords were consenting parties, for they bought part of the fixtures at the sale without raising any objection. At any rate, they cannot recover the money which they themselves paid. The rightful nature of the act must be determined once for all at the time when it is done.

(1) Law Rep. 7 Ex. 242.
(2) Ibid. 246.
(3) Ibid. 244.
(4) Law Rep. 10 Ex. 137.
(5) 2 East, 88.
(6) 14 W. R. 860.

*De Gex*, in reply:—

Sect. 23 says that the Court may order possession of the disclaimed property to be delivered up. By removing the fixtures the trustee has put it out of his power to deliver up the disclaimed property, *i.e.*, the lease and all belonging to it; and it is right, therefore, that he should pay the value of what he has removed. It is said that a tenancy is to be implied between the date of the trustee's appointment and the disclaimer, but there was no new contract between the landlord and the trustee.

[THESIGER, L.J.:—In *Saint* v. *Pilley* (1) it was held that the purchaser of fixtures from the trustee was entitled to them as against the landlord.]

There there was an actual surrender by the trustee. He had previously sold his right to disannex the fixtures, and he could not convey to the landlord more than he himself had. The landlord could not call on the trustee to pay rent for the period between his appointment and the disclaimer: *Ex parte Dressler* (2). The trustee was in possession of the property solely for the purpose of exercising his judgment whether he would disclaim or not: *Ex parte Stephens* (3). Sect. 35 gives the landlord a right to prove for the rent due up to the date of the adjudication; that tends to shew that the trustee never became tenant. The words of sect. 23 are clear. *Weeton* v. *Woodcock* (4) shews that what has been called an "excrescence" on the term only arises when the term has not been put an end to by the tenant's own act.

[JAMES, L.J.:—The word "excrescence" *ex vi termini* means something growing out of the original term, such as a tenancy at will after its expiration.]

*Smyth* v. *North* (5) has no application; the question there was, whether sect. 23 applied to strangers to the bankruptcy.

*Winslow*, in reply:—

The decision in *Ex parte Dressler* was founded on this, that the trustee had not disclaimed the lease, but had surrendered it. If

(1) Law Rep. 10 Ex. 137.
(2) 9 Ch. D. 252.
(3) 7 Ch. D. 127, 131.
(4) 7 M. & W. 14.
(5) Law Rep. 7 Ex. 242.

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he had disclaimed, he could not then recover from the landlord rent which he had paid him. But that must be the result, if the effect of a disclaimer is to put an end to the lease for all purposes.

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Judgment, C. A.

Dec. 12. The judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.), was deliverd by

THESIGER, L.J., who, after stating the facts, continued:—

The question in dispute turns upon the effect to be given to sect. 23 of the *Bankruptcy Act*, 1869. In the recent case of *Ex parte Stephens* (1), before this Court, the effect of the disclaimer of a lease, in respect of tenant's fixtures severed by the trustee subsequently to the disclaimer, was considered, and it was decided that the landlord was entitled to them as against the trustee. The Chief Judge has held that the circumstance in the present case of the severance having occurred before disclaimer constitutes such a distinction between it and *Ex parte Stephens* as to render the latter no authority upon the point now to be decided. We, however, are of opinion that the *ratio decidendi* in that case is wide enough to govern the decision of the present. The premiss upon which our judgment was founded was, that where the trustee in a liquidation disclaims, there, by the joint operation of the disclaimer and the provisions of sects. 23 and 125 of the Act, the term is to be deemed for all purposes to have come to an end on the day of the appointment of the trustee. In other words, the trustee is placed in the position of never having had any estate at all. But, from this premiss, the logical and legal conclusion is, not merely that a severance by the trustee of fixtures after the disclaimer is wrongful, although that is included, and was all that was necessary to be decided in *Ex parte Stephens*, but that any severance which has taken place after the date when the term is put an end to for all purposes, and by a person who, like a trustee, is in the position of never having had any interest in the term, must necessarily be wrongful.

Apart, however, from the authority of *Ex parte Stephens*, we arrive at the conclusion that the landlords' claim in the present

(1) 7 Ch. D. 127.

case is a well-founded one. The general presumption of law with reference to tenants' fixtures remaining affixed to the freehold when a term comes to an end is, that "they become a gift in law to him in reversion," and are, therefore, not removable (per Lord *Holt* in *Poole's Case* (1)). That general presumption has, however, been made subject to a qualification which is expressed in the proposition laid down by the Court of Exchequer in *Weeton* v. *Woodcock* (2) in these terms—viz., "that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant," or, in the language of Baron *Parke* in *Mackintosh* v. *Trotter* (3), "that the tenant has the right to remove fixtures of this nature during his term, or during what may for this purpose be considered as an excrescence on the term." Much reliance has been placed in argument on the part of the Respondent upon this qualification of the general presumption of law, and it has been urged upon us that in this case the period between the appointment of the trustee and the disclaimer was such an "excrescence" on the term, and that the Respondent had during that period a right to consider himself as tenant. We cannot accede to that argument. It is not easy to define precisely what was meant by the propositions to which we have just referred, and we observe, that as regards the rule laid down in *Weeton* v. *Woodcock*, the difficulty which we feel in understanding its exact meaning was shared in by the Court of Common Pleas, as stated by Mr. Justice *Willes* in delivering the judgment of that Court in *Leader* v. *Homewood* (4). It may be that in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in the case where an interest of uncertain duration comes suddenly to an end, and the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures and to remove them with his goods and chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture, and the tenant remains on the premises for such reasonable time as last referred

(1) 1 Salk. 368.
(2) 7 M. & W. 14, 19.
(3) 3 M. & W. 184.
(4) 5 C. B. (N.S.) 546, 553.

C. A. 1878 *Ex parte* BROOK. *In re* ROBERTS. Judgment, C. A.

to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy. But, however that may be, we are clearly of opinion that the case of a surrender of a lease by a tenant, while tenant's fixtures remain affixed to the freehold, does not, either upon principle or the authority of decided cases, give any right to the tenant subsequently to remove such fixtures. At the date of the surrender they form part of the freehold, and the law has no right to limit the effect of the surrender by excluding from it that which legally passes by it, and which has not been excluded from it by the bargain of the parties. If that be so, then when the Legislature, by sect. 23 of the *Bankruptcy Act*, 1869, says that a lease disclaimed shall be deemed to be surrendered, are we justified in attributing to the language used any meaning other than that which is its natural meaning—viz., that the ordinary consequences of a surrender shall follow the disclaimer? No doubt difficulties will always arise when Courts are called upon to treat a thing as being in law that which in fact it is not: and if in this case the strict carrying out in all points of the analogy of an ordinary surrender were to lead to consequences manifestly absurd or unjust, it would be the duty of the Court to find, if possible, some construction of the section in question which would not entail such consequences. In the present instance no such consequences are the result of the construction which the language of the section naturally requires. Extreme cases may, it is true, be put in which it would work a hardship upon the creditors, and the present case is, perhaps, an example; for, if the trustee had kept the property on for a year, he might, at the expense of the small payment of £40, have obtained the fixtures in dispute. But in a vastly greater number of cases any different construction would work a considerable hardship upon the landlord. Indeed, in *Saint* v. *Pilley* (1), Baron *Amphlett* appears to have considered the dismantling of a house by severance of tenant's fixtures inconsistent with the exercise of the right of disclaimer, and to have been disposed, as stated by him (2), to agree with the view taken in *Amos* on Fixtures (3), that after the sale of fixtures a trustee

(1) Law Rep. 10 Ex. 137. (2) Law Rep. 10 Ex. 141.
(3) 2nd Ed. p. 239.

could not disclaim. When, too, it is remembered that the section under consideration is one which, upon any construction of it, favours the interests of the creditors at the expense of the landlord, we think that it would be unreasonable to allow possible cases of hardship upon the creditors to weigh against an interpretation of it which gives to the analogy of a surrender its natural and proper effect. A suggestion was made in argument, although not much pressed, that even though the Appellants may be entitled to recover the proceeds of fixtures sold to third parties, they cannot recover moneys paid by themselves under no mistake of fact. But we think that a distinction ought not to be made between those moneys and the remainder of the moneys arising from the sale. At the time when the sale took place no disclaimer had been made; the trustee was acting, apparently, within the scope of his powers; and the landlords could do no more than give him notice that he was required to exercise his election as to whether he would disclaim or not; and, looking to the fact that the time limited by the 24th section of the *Bankruptcy Act*, 1869 (twenty-eight days), for the exercise of his election had not expired when the sale took place, it would be contrary to justice to hold that the landlords, under such circumstances, endeavouring to prevent the complete dismantling of their property, and having no other means of doing so than by themselves purchasing and paying for the fixtures, are, when, by the subsequent conduct of the trustee, the fixtures purchased by them turn out to be their own, precluded from recovering the money which they had paid for them. Whether a sale of fixtures by a trustee has or has not in ordinary cases the effect attributed to it by Baron *Amphlett*, it is unnecessary in this case to decide, for we are of opinion that it does not lie in the mouth of the trustee, as between him and the Appellants, to assert the invalidity of the disclaimer. The effect, therefore, of a disclaimer generally being such as we have laid down, and there being in the agreement between the debtor and his landlords no special stipulations as regards fixtures which make this case in any way exceptional, the necessary conclusion must be that the Respondent, by disclaiming the property to which the fixtures were attached after his sale of those fixtures, constituted himself by relation a wrong-doer in respect of that sale, and

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is liable to pay over to the Appellants the whole of the moneys which by his wrongful act he has realized. The appeal must be allowed, the judgment of the Chief Judge reversed, and the order of the County Court Judge restored, with costs here and in the Court below.

Solicitors for Appellants: *Williamson, Hill, & Co.*, agents for *Foster & England, Halifax.*

Solicitors for Trustee: *Learoyd, Learoyd, & Peace*, agents for *J. W. Longbottom, Halifax.*

## SMITH *v.* BUTCHER.

M. R.
1878
*Nov.* 18.

[1878 S. 268.]

*Will—Gift of Personal Estate to A. for Life with Remainder to his "Lawful Heirs"—Literal Construction.*

Bequest of personal estate to "the children of *A.* during their lives, and on the decease of either of them his or her share of the principal to go to his or her lawful heir or heirs":—

*Held*, that "lawful heir or heirs" must be read literally, and not as meaning "next of kin," "executors or administrators," or "children."

*Mounsey* v. *Blamire* (1) disapproved of.

25 L.D. 21
214, 9

Statement.

*ROBERT BUTCHER*, who died in 1820, by his will dated in 1818, not attested so as to pass real estate, made the following bequest:—

"The rest of my property which may arise from debts due to me, money in the funds, or otherwise, from the sale of my furniture, books, and from any other source, I desire may be placed in the public funds, and the interest arising therefrom to be equally divided among the children of my brother during their lives, and on the decease of either of them his or her share of the principal to go to his or her lawful heir or heirs."

Part of the testator's residuary estate consisted of a leasehold house which, in 1876, was sold by his trustees, the proceeds being invested in £2039 consols.

The testator's brother had six children, and on the death of the survivor of them the question arose who were the persons entitled to the fund under the words "lawful heir or heirs."

The action was brought for the purpose of having the true construction of the will and the rights and interests of all parties in the fund ascertained and declared, and now came on upon motion for judgment.

Argument.

*Farwell*, for the Plaintiffs, the heirs and co-heiresses-at-law of the six children of the testator's brother:—

I submit that the words "lawful heir or heirs" should be con-

(1) 4 Russ. 384.

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strued literally, and that the heirs-at-law take as *personæ designatæ*: *De Beauvoir* v. *De Beauvoir* (1); *Sheppard's Touchstone* (2). A gift of personal estate to "heirs" is construed in the same way whether the gift is immediate or, as here, in remainder: *De Beauvoir* v. *De Beauvoir* (3); *Hawkins* on Wills (4).

[JESSEL, M.R., referred to *Low* v. *Smith* (5), where Vice-Chancellor *Kindersley* held the word "heirs" to mean "next of kin."]

In that case there were words of distribution from which it was gathered that the testator meant "next of kin."

JESSEL, M.R., also referred to *Danvers* v. *Earl of Clarendon* (6).

*W. W. Karslake*, for the Defendants, some of the next of kin of the children:—

The principle is that where the word "heir" is used to denote succession, as here, it means the person who would succeed to the property according to its nature and quality: *Mounsey* v. *Blamire* (7).

[JESSEL, M.R.:—That is a very unsatisfactory authority: it stands alone, I think. The rule is to adopt the legal and technical meaning of the word unless it is controlled by the context—as I stated in *Leach* v. *Jay* (8).]

In *Gittings* v. *M'Dermott* (9), the Lord Chancellor (Lord *Brougham*) appears to assent to the principle laid down in *Mounsey* v. *Blamire*.

[JESSEL, M.R.:—Is there any case in which, under a gift in remainder of personal estate, the word "heirs" has been held to mean "next of kin"?]

In *In re Philps' Will* (10), where the testator directed that a sum of stock should, after the death of his wife, be divided among his children then living, "or their heirs," the word "heirs" was

(1) 3 H. L. C. 524.
(2) Page 446.
(3) 3 H. L. C. 524, 557.
(4) Page 92.
(5) 2 Jur. (N.S.) 344.
(6) 1 Vern. 35.
(7) 4 Russ. 384, 387.
(8) 6 Ch. D. 496.
(9) 2 My. & K. 69.
(10) Law Rep. 7 Eq. 151.

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held to mean "next of kin": and in *Wingfield* v. *Wingfield* (1) a gift of personalty in remainder to "heirs" was similarly construed. I therefore ask your Lordship to lay down as a principle that where personal estate is given by will to *A.* for life with remainder to his "heirs," the word "heirs" means the persons who would take the property supposing he died intestate; and that it makes no difference whether the gift is in possession or substitution, or in remainder or succession.

*Barratt*, for the Defendant, the legal personal representative of one of the children:—

I submit that the word "heirs" should be read as "executors and administrators," and that the children took absolutely by analogy to the rule in *Shelley's Case* (2) by which a limitation of real estate to a man for life with remainder to his heirs gives him the absolute estate in fee: *Gittings* v. *M'Dermott* (3); *Thompson* v. *Thompson* (4); *Theobald* on Wills (5).

[JESSEL, M.R.:—*Powell* v. *Boggis* (6) seems to be the nearest case to yours; but it is useless to rely upon it, as the decision depended on the particular construction of the words of the will.]

*W. M. Spence*, for the trustees of the will, suggested that "heirs" might mean "children."

*Farwell*, in reply.

JESSEL, M.R.:— Judgment.

I think the words "heir or heirs" must bear their ordinary and primary meaning.

The true rule is that laid down by Vice-Chancellor *Kindersley* in *Low* v. *Smith* (7), where he says, referring to Lord *St. Leonards'* decision in *De Beauvoir* v. *De Beauvoir* (8), "There was no peculiarity in this particular question; it was a mere application of what was the ordinary elementary rule of construction, that for the purpose of construing any word in any will that ever was exe-

(1) 9 Ch. D. 658.
(2) 1 Rep. 93 b.
(3) 2 My. & K. 69, 79.
(4) 1 Coll. 388.
(5) Page 224.
(6) 35 Beav. 535.
(7) 2 Jur. (N.S.) 344.
(8) 3 H. L. C. 524.

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cuted, such word must receive its ordinary and primary meaning, unless the Court is satisfied that the testator intended to use it in a secondary and less proper sense."

That applies to all wills, and not the less so when any particular word used by a testator is a technical word and a word of art, which is less difficult to construe.

Now it is quite possible that the testator in this case did not mean what by his expressions he must be taken to have meant. If I were at liberty to guess what he meant by the words "lawful heir or heirs," I should guess that he meant "children;" but I am not at liberty to guess; I must take the words of the will as they stand.

What he has done is this. By his will—which was not attested so as to pass real estate, and therefore passed only personal estate—he makes the following bequest:—[His Lordship read it.] The question is what that means. Now there is no expression which has a clearer meaning in law than the expression "lawful heirs." It means the person or persons who either alone or together would succeed to the fee simple estate of which the intestate ancestor died seised in possession at the time of his death. That is what it means: there can be no doubt as to what it means.

It is suggested that the testator in making this bequest to the "lawful heir or heirs" meant "children," and that therefore they take, but that is not the primary nor natural meaning of the word "heirs."

Then it is said that there is a rule as to real estate, called the rule in *Shelley's Case* (1), which supports the contention that the testator intended to give an absolute interest to his brother's children, an interest or estate corresponding to the legal estate in fee simple in real estate; and it is said that although that rule does not directly apply to personal estate at all, it may nevertheless be applied by analogy as indicating the testator's possible intention. It has, however, in my opinion, no application to the present case.

In *Low* v. *Smith* (2) the very point occurred. In that case there was a gift of personalty, after the death of *A.*, to be equally divided among his "legal heirs." The question, as the Vice-

(1) 1 Rep. 93 b. (2) 2 Jur. (N.S.) 344.

Chancellor put it, was simply whether "legal heirs" meant "heirs" in the strict primary sense, or "next of kin." The rule in *Shelley's Case* (1) did not apply at all, nor did the Vice-Chancellor in any way suggest that it could.

Then, that artificial rule of construction not having anything to do with this case, what have we in this will to control the ordinary meaning of the word "heirs"? Nothing at all, except that, as the testator bequeaths personal estate to "heirs," he means, so it is said, that it is to descend to the persons who can alone succeed to personal estate, and not to the persons who can succeed only to real estate.

But that is concluded by decisions to the contrary two or three hundred years old, which are all summed up by Lord *St. Leonards* in his speech in *De Beauvoir* v. *De Beauvoir* (2).

Therefore that will not do. Well, that being out of the way, there is nothing else at all to be found in this will. It is merely a gift of personal estate in remainder to "heirs," and it makes no difference whether the gift is an immediate gift in possession, or a gift in remainder.

That again is settled by a long line of authorities, ending with *De Beauvoir* v. *De Beauvoir*.

The result is that this is really nothing more than a simple gift of personal estate to the children of *A.* for their lives with remainder to their heirs. There is nothing else.

That being so, I hold that the testator has used expressions which mean that the right heirs of the children are to take, and I so decide.

Costs of all parties out of the fund.

Solicitors: *Thompson & Debenhams.*

(1) 1 Rep. 93 b. (2) 3 H. L. C. 524.

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1878

Nov. 30.

## *In re* NATIONAL FUNDS ASSURANCE COMPANY.

*Company—Winding-up—Companies Act*, 1862, *s.* 165—*Companies Act*, 1867, *s.* 27—*Share Warrants to Bearer—Paying Interest out of Capital—Assent of Company—Liability of Directors—Liquidator—Summons by—His Position and Powers.*

12 Ch D 506
4 Ch D 343
16 Ch D 492
7 Ch D 81,
21 Ch D 154
— 520, 4-6
533
12 Ch D 353-5
361-6, 9

The powers of a liquidator of a limited company are more extensive than those of the company prior to the winding-up order: for instance, he can assert as against the members of the company rights which the company itself could not have asserted.

*Dictum* of Lord *Hatherley* in *Waterhouse* v. *Jamieson* (1) approved of.

Under sect. 165 of the *Companies Act*, 1862, either the liquidator, or a creditor, or a contributory of a limited company in course of being wound up, may apply to the Court for an order to compel a director to repay moneys of the company misapplied by him; and if the liquidator makes such an application, it is unnecessary to consider whether he does so as representing the company or as representing the creditors, he having, upon the literal construction of the section, an independent right to apply in a proper case.

The creditors of a limited company are entitled, by virtue of a contract between themselves and the company, to be implied if not expressed, to have the capital of the company reserved for payment of their claims; consequently, the repayment by the directors to the shareholders of the whole or any part of the capital, either in the form of interest on share warrants issued under the *Companies Act*, 1867, s. 27, or otherwise, and whether such repayment be made with the sanction of the shareholders or not, is, unless such repayment be expressly authorized by the articles of association, *ultrà vires* and a breach of trust; and if the company be ordered to be wound up the Court will, upon an application either by the liquidator or by a creditor, under sect. 165 of the *Companies Act*, 1862, order the directors jointly and severally to make good the amount of capital so repaid, but, in case the repayment has been made with the sanction of the shareholders, without prejudice to the right of the directors to recover the amount from the shareholders.

The articles of association of a limited insurance company provided (122) that "the directors might, without the sanction of a general meeting, pay interest at the rate of 5 per cent. per annum upon the paid-up capital."

The company, desiring to raise further capital, passed a resolution empowering the directors, under the *Companies Act*, 1867, s. 27, to issue to members who had paid up the full amount of their shares, share warrants payable to bearer. Share warrants were issued accordingly, each warrant declaring that the bearer was entitled to interest at 5 per cent. per annum on the amount therein specified.

The company never having made any profits, the interest on the warrants

(1) Law Rep. 2 H. L., Sc. 32.

was from time to time paid to the holders of them out of capital by the directors with the express sanction of the general body of shareholders, and on the assumption that such payment was authorized by Article 122.

The company having been ordered to be wound up, the liquidator applied by summons under sect. 165 of the *Companies Act*, 1862, that the directors might be ordered jointly and severally to pay to him the amount so paid for interest to the holders of the share warrants:—

*Held* (1.), that upon the literal construction of sect. 165 the liquidator was entitled to make the application, independently of the question whether he, as representing the company, could sue its own agents, or whether he had an independent right to represent the creditors:

(2.) That the directors had, in making payments to shareholders out of capital, acted *ultrà vires* and committed a breach of trust, and that they were therefore liable jointly and severally to make good the amount of such payments, but without prejudice to their right to recover from each shareholder the amount of capital he had received.

Statement.

THE *National Funds Assurance Company, Limited,* was established with a nominal capital of £250,000, divided into £5 shares.

The articles of association contained various provisions for the application of the property and capital of the company in discharge of the claims of policy-holders and others; for setting apart a reserve fund for the same purpose; and for creating out of the insurance premiums a guarantee fund to be invested in government securities as an additional security to the policy-holders in particular; the expressed object of these provisions being to increase the stability and solvency of the company.

The articles also empowered the directors to issue to members of the company who had paid up the full amount of their shares "share warrants to bearer"; and then provided as follows:—

"122. The directors may, without the sanction of a general meeting, pay interest at the rate of 5 per cent. per annum upon the paid-up capital of the company.

"123. No dividend shall be payable except out of the profits arising from the business of the company, . . . . but (without prejudice to any preferential or guaranteed dividend) no dividend shall exceed the sum recommended to such meeting by the board."

In December, 1872, the company, desiring to raise further capital, passed the following resolution:—

"That in accordance with the provisions of the *Companies Act*, 1867, s. 27, the directors be empowered to issue to members of the

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Statement.

company who have paid up the full amount of their shares share warrants payable to bearer."

Share warrants were accordingly issued in the following form:—

"No. ——, 187—. The *National Funds Assurance Company, Limited, 33, Finsbury Square, London, E.C.*

"Share warrant to bearer £——.

"The bearer hereof is entitled to —— fully paid-up shares of £5 each in the capital stock of this company.

"——, Directors.

"Countersigned —— for and on behalf of the company.

"The bearer is entitled to interest at the rate of £5 per cent. per annum on the sum of £—— from the date hereof. Such interest becomes due and payable at the registered offices of the company on and after the 1st of April and the 1st of October in each year.

"Note.—In addition to such interest shareholders are entitled to twenty per cent. of the net profits of the company to be declared every three years."

A considerable number of these share warrants were taken up by shareholders of the company, including the directors, or some of them.

At the annual meetings of the company held in 1872, 1873, and 1874, and which were attended both by shareholders who held share warrants and by ordinary shareholders, balance-sheets shewing the financial position of the company were produced and read, from which it appeared that the company had never raised sufficient capital for carrying on its business; that it had never made any profits; and that in 1872 there was a large deficit, which was increased during the two following years. The balance-sheets also shewed the amounts which remained due for interest on the share warrants.

It appeared that at one at least of these meetings considerable discussion took place between some of the shareholders and the directors as to the right of the company to allow interest on the share warrants, but that eventually the payment of it was not only not objected to but sanctioned by the shareholders present.

During the years 1873, 1874, and 1875, sums amounting alto-

gether to £1311 7*s.* 2*d.* were paid by way of interest to the holders of share warrants, although, as it appeared from the evidence, the company never made any profits or had any other income available for such payments.

Ultimately the company, having lost nearly the whole of its subscribed capital, and having become hopelessly insolvent, was ordered to be wound up.

Statement.

This summons was then taken out by the liquidator under sect. 165 of the *Companies Act*, 1862, asking that those directors who were on the board at the times of payment of the interest on the share warrants might be ordered, as "being directors of the company and trustees on behalf of the shareholders and creditors," jointly and severally to pay to him the whole amount, £1311 7*s.* 2*d.*, "being the sum improperly paid by the said directors for interest or dividends to the shareholders;" and further, that such directors might be ordered to repay to the liquidator "such sum paid or received by them respectively for interest or dividends."

The directors stated in evidence that they were always advised and always believed that under the 122nd article of association they were justified in paying interest on the share warrants.

Argument.

*Ince*, Q.C., and *Seward Brice*, for the liquidator:—

It is clear that as the company made no profits, and had no other available income, the interest on the share warrants must have been paid out of capital, a proceeding which was manifestly *ultrà vires* and improper; and the fact that the payment was made with the consent of the general body of shareholders makes no difference.

The law is thus laid down in *Lindley* on Partnership (1): "With respect to companies, however, there are reasons why capital and money borrowed should not be applied in making payments to shareholders, even although they may all consent. In the first place, such an application of the money is calculated to deceive the public, and can hardly be made for any honest purpose; and in the next place, capital raised, or money borrowed, in order to carry on the business of the company, cannot be properly applied

(1) 3rd Ed. p. 814.

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for such a wholly different purpose as that of paying dividends to the shareholders."

[They were stopped by the Court.]

*Chitty*, Q.C., *W. W. Cooper*, and *Cozens-Hardy*, for the directors:—

In the first place, this summons is wrong in point of form; for the liquidator, who merely appears in right of the company, cannot recover what the company itself could not have recovered: *Waterhouse* v. *Jamieson* (1); and the company could not have recovered this money from these directors, they being merely its agents: *Turquand* v. *Marshall* (2); we also refer to your Lordship's argument in that case (3). The liquidator has no independent right to sue on behalf of the creditors of the company; he can only support their rights by virtue of his being the representative of the company, and through the company: *In re Duckworth* (4); but as the company or its representative cannot sue its own agents, and there are no creditors appearing on this summons, there is no one here in a position to enforce this claim.

In the second place, it is not alleged that the balance-sheets were fictitious, or that any fraud was attempted against either the shareholders, the creditors, or the public. The payments in question were authorized by the 122nd article of association; at all events the directors acted *bonâ fide* and under the belief that they were acting within the powers conferred upon them by the articles; and, moreover, the nature of the transaction was fully discussed by the shareholders, who themselves assented to the payments now sought to be impeached. Under such circumstances the directors cannot now be charged with any personal liability: *Stringer's Case* (5); *Rance's Case* (6).

There is no case to be found in which the Court has gone the length of granting an application by a liquidator for an order to make the directors of a company repay moneys paid by them under the shareholders' authority.

(1) Law Rep. 2 H. L., Sc. 29.
(2) Ibid. 4 Ch. 376.
(3) Ibid. 6 Eq. 123.
(4) Law Rep. 2 Ch. 578, 580.
(5) Ibid. 4 Ch. 475, 492, 493.
(6) Ibid. 6 Ch. 104.

*Ince*, in reply:—

Upon the question of form, the liquidator does not represent the company alone, he represents the creditors also, and in that capacity can proceed against any director or other officer of the company for any misfeasance or breach of trust. Unless the liquidator does represent creditors, the 165th section of the Act of 1862 is unintelligible.

In *Waterhouse* v. *Jamieson* (1), Lord *Hatherley* expresses it as his opinion (2), though he does not actually decide the point, that the liquidator, being bound to collect all the assets of the company and distribute them among the creditors, is in a position in which he may assert rights as against the company, and assume a position against its members which the company itself possibly might not be in a position to assert.

[Jessel, M.R.:—My view of the Act certainly agrees with that of Lord *Hatherley*. It seems to me that the powers of the liquidator are more extensive than those of the company. For instance, under the 38th section, he can make a member of the company pay what the company itself could never have made him pay; for he can enforce contributions from the member which the company could not have enforced. However, if necessary, I will allow the summons to be amended by putting in a creditor, to argue the question independently.]

*Evans* v. *Coventry* (3) is a distinct authority that directors can be compelled to repay a dividend improperly declared by them; and that is confirmed by *Stringer's Case* (4). This is a stronger case than *Evans* v. *Coventry*, for there the creditors of the company—which was an unlimited insurance company—had an unlimited fund to resort to, whereas here they can only look to a limited fund. This limited fund having been intended as a security, and being the only security, for the creditors, the directors and shareholders had no right to distribute any part of it amongst themselves. Payment of what was really a preferential dividend out of capital was certainly a breach of trust, besides being a

(1) Law Rep. 2 H. L., Sc. 29.
(2) Ibid. 32.
(3) 25 L. J. (Ch.) 489; 8 D. M. & G. 835.
(4) Law Rep. 4 Ch. 475.

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misapplication of the moneys of the company, and we are therefore clearly within the 165th section.

*Chitty*, in reply, upon *Evans* v. *Coventry* (1):—

In that case the Plaintiffs, the insured, had a special right by contract to have the company's funds applied in a particular way, and the directors were held responsible for a misapplication of those funds. But here the directors were acting under the express authority of the shareholders, and that being so, if there is any liability at all, the shareholders who have received this money should at least participate with the directors in the responsibility of refunding it.

Judgment.

JESSEL, M.R.:—

14 Ch D 345 346

The question is one of great difficulty by reason of the authorities, and my decision may possibly not be reconcilable with one or more of them. In the view which I take of them, I think they do not really, when fairly considered, prevent my arriving at the conclusion at which I should have arrived had there been no authorities at all.

I will first of all consider the case as it presents itself to my mind independently of the decisions. The 165th section of the Act of 1862 says, "Where, in the course of the winding-up of any company under this Act, it appears that any past or present director . . . . has misapplied . . . . or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company . . . . examine into the conduct of such director . . . . and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable."

Now I will say a word or two as to the person who may apply under that section. I read the section literally; that is, as I understand it, the liquidator, or a creditor, or a contributory, may apply: it is for the Court to put the section in force if it thinks proper; and if it is proper to put it in force, I take it

(1) 25 L. J. (Ch.) 489; 8 D. M. & G. 835.

that the order may be made on the application of any one of those persons.

It does not appear to me to be necessary to inquire what the position of a liquidator suing third persons or suing shareholders may be. All I have to do is to obey the Act of Parliament, which is clear, plain, and unambiguous in its terms. Therefore, I think the decisions which have been cited have no application to this part of the case; and I think also that it is plain, after *Webb* v. *Whiffin* (1) and other decisions of the House of Lords, that after the winding-up of a company new rights are given by the Act of Parliament—rights which did not exist before the winding-up, and rights which can be enforced only under the winding-up. I think this altogether disposes of the objection as to the liquidator being the moving party; but to avoid any possibility of question—not because I entertain any doubt about it, but out of respect to some of the *dicta* which may possibly be understood in the sense in which they have been urged upon me—I will allow the summons to be amended by adding a creditor.

So much for the form of the application. Now for the summons itself. The substance of it is this. A limited assurance company—that is, an assurance company with limited liability—has capital subscribed which, as I read the articles of association taking them as a whole, is to be applied as capital and in no other way; that is, it is to be applied to purposes to which capital is properly applicable, namely, payment of the debts, obligations and liabilities of the company. I cannot find from the beginning to the end of these articles anything like a power to return capital. The only clause which was at all relied upon was the 122nd, which says that, "the directors may, without the sanction of a general meeting, pay interest at the rate of 5 per cent. per annum upon the paid-up capital of the company." Then the 123rd article says that no dividend shall be payable except out of profits: and dividends can only be paid with the sanction of a general meeting.

It does not appear to me that the 122nd article, rightly considered, authorizes the payment of interest out of capital, but only out of income. The very words of it shew me that, although they

(1) Law Rep. 5 H. L. 711.

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may not shew it to everybody, and indeed are asserted not to have shewn it to the directors. The words, "without the sanction of a general meeting," I think were intended to distinguish that which the directors might do without that sanction from that which the directors are to do only with that sanction. They can only pay the dividend with the sanction; they may pay the interest without the sanction; but unless I find in the clearest and plainest terms a power to the directors to return the capital to the shareholders by instalments of 5 per cent.—that is, to return the whole capital in twenty years—I should not so read the articles; and, in my opinion, these articles do not authorize the return of capital.

I now come to the next point. If there is no authority to return capital, did the directors return capital? When I look at the balance-sheets which they themselves prepared, and the evidence in the case, in my opinion there can be but one answer—they clearly did. They had nothing else to pay it out of: income they could have had none. [His Lordship then referred to the balance-sheets for 1872, 1873, and 1874, to shew that the company had not made any profits whatever, and that there had been a large and constantly increasing deficiency, and continued:—]

Upon reading these balance-sheets, can it be pretended for one moment that there was any available income to pay this large loss? I am satisfied that every one of these directors who concurred in the payments in question knew that they were payments out of the small remnant of capital that remained, and out of nothing else. That I am satisfied of as a fact.

I now come to another fact. It appears that this company was divided into two sorts of shareholders. The one sort took this thing called a share warrant, and the other sort did not. Both kinds of shareholders attended the annual meetings, and it does appear that the directors did produce these balance-sheets, and that they were read, and that, in spite of their being so produced and read, the shareholders present consented to the directors paying the interest to the warrant shareholders and not to the other shareholders.

It is then said, that would prevent any action against the directors. If there was no power to do this thing vested in the

directors, there was no power to do it at the shareholders meeting. It must have been equally *ultrà vires* to give 5 per cent. out of capital back to the shareholders as to give the whole capital *uno flatu* by a single resolution of the meeting; and, with the knowledge in the possession of the directors, I really cannot think it made any substantial difference what the proportion was, they knowing what they were doing when they returned what was in fact capital.

That being so, and the action of the directors being *ultrà vires* and improper, is it within the terms of the section? Let me see who has the right to complain. The creditors have the right, as I read the articles, considering the nature of the company, to have the capital kept for the payment of their claims. I think it quite immaterial that the right is not expressed in the same terms as was done in *Evans* v. *Coventry* (1). That is the substance of the right. The limited company trades upon the representation of being a limited company with a paid-up capital to meet its liabilities. It is wholly inconsistent with that representation that the company, having its capital paid up, should pay it back to its shareholders, and give the creditors nothing at all.

It appears to me, therefore, that the right of the creditors is clear, and I think it can be enforced either by one of them or by the liquidator.

Then the directors say that, even assuming all that has been said, they acted *bonâ fide*, and that their shareholders who took the money are liable as well as themselves. That may be so, if they are liable at all, which they deny. They say the creditor has no rights at all; for the argument is pushed to that extent before me. It is said the creditors cannot sue except through the company, and the company has aquiesced, or done something of that kind, as between themselves and the directors. Then I say push your argument to the extreme, and take the case of a company which, with £100,000 worth of paid-up capital, owes £100,000 worth of debt, and has no means to meet it except the £100,000 paid-up capital. According to the argument of the Respondents, the company can meet and divide the £100,000 of its paid-up capital among its shareholders, and you cannot make anybody

(1) 25 L. J. (Ch.) 489; 8 D. M. & G. 835.

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liable for getting rid of the capital, not even the managing partners of the concern.

Of course if the argument is good for 5 per cent. it is good for the whole, and it does not appear to me to be an argument which ought to receive much attention from a Court of Justice. If I were bound by the decisions to say that was so, I should bow to them, but I think I am not so bound.

That being so, the only question which remains is, have the directors, in the words of the Act of Parliament, "misapplied any moneys of the company"? I think they have misapplied them by dividing the capital among a portion of their shareholders. That appears to me to be a plain case of misapplication within the very terms of the section.

I think also they have been guilty, within the meaning of the 165th section, of a "breach of trust in relation to the company," by dividing part of the capital among their shareholders, and that they are liable for doing it. Ought I to make them account? I think I ought. As to saying they did it *bonâ fide*, I think it is impossible to come to that conclusion; a man may not intend to commit a fraud, or may not intend to do anything which casuists might call immoral, and he may be told that to misapply money is the right thing to do, but when he has the facts before him—when the plain and patent facts are brought to his knowledge—as I have often said, and I say now again, I will not dive into the recesses of his mind to say whether he believed, when he was doing a dishonest act, that he was doing an honest one. I cannot allow that man to come forward and say, "I did not know I was doing wrong when I put my hand into my neighbour's pocket and took so much money out and put it into my own." It is impossible in a Court of Justice to call a particular act a *bonâ fide* act simply because a man says that he did not intend to commit a fraud.

This Court is not, as I have often said, a Court of conscience, but a Court of Law; and when a man misappropriates money with a knowledge of all the facts, I cannot allow him to say that he is not liable simply because somebody or other told him that he was not doing wrong, or that somehow or other he convinced himself that he was not doing wrong.

That being so, it appears to me the order should be made as

asked, limiting of course the liability of each director to those sums which he participated in paying. As regards any one or other of the directors who has paid his proportion, of course it must be without prejudice to his right to call upon this Court to enforce against the shareholders who did receive the sum of money, repayment by summons or otherwise, and that should be provided for in the order. In each transaction I hold that each director is jointly and severally liable to make the payment good.

Now as regards the authorities. As far as I understand the case of *Evans* v. *Coventry* (1), it is a case in favour of the view I have held. I do not think it is easy to distinguish the case on the ground of express contract with the directors that the capital should be forthcoming. I think there was such a contract here; if not, there was an implied contract.

As regards the other authorities, I think *Rance's Case* (2) is an authority for making a man pay back the money he has received, but it is no authority for making him not liable to pay back what somebody else has received. All that was asked there was that a man should repay the money which he had himself received. That case, therefore, has no application to the present.

As I read *Stringer's Case* (3), it is not an authority on the subject. Neither the decision nor the *dictum* goes to the point.

As regards the other authorities which were cited with reference to the position of the liquidator—*In re Duckworth* (4) and *Waterhouse* v. *Jamieson* (5)—the observations of Lord *Cairns* and Lord *Westbury* refer simply to the cases before them, and were not intended to apply, and do not, in my opinion, apply to an application under the 165th section of the Act.

I therefore come to the conclusion that the authorities are not at variance with the decision which I have pronounced.

Solicitors: *E. Beall; Routh, Stacey, & Castle; W. Evans.*

(1) 25 L. J. (Ch.) 489; 8 D. M. & G. 835.
(2) Law Rep. 6 Ch. 104.
(3) Law Rep. 4 Ch. 475, 492, 493.
(4) Ibid. 2 Ch. 578, 580.
(5) Ibid. 2 H. L., Sc. 29.

M. R.

1878

Dec. 7.

## *In re* HULL AND COUNTY BANK.

*Practice—Company—Winding-up—Creditor—Costs of Appearance.*

A creditor appearing on a winding-up petition is not entitled to his costs as a matter of right: to entitle him to them he must shew a reasonable ground for appearing; and if he appears merely to ask for them, and nothing more, they will be refused.

Statement. HIS Lordship having made a supervision order on two petitions for winding up the *Hull and County Bank*,

Argument. *Burton Buckley*, for a creditor, the accountant of the company, whose debt, £32, for preparing a balance-sheet, had been offered, by a letter written to him by the company's solicitors, to be guaranteed by the chairman and vice-chairman of the company personally, or, if he preferred it, by the undertaking of the solicitors themselves, asked for his costs under the usual order.

*Waller*, Q.C., *Chitty*, Q.C., and *Whitehorne*, for the two petitions.

*Cozens-Hardy*, for a shareholder.

*Davey*, Q.C., and *W. Barber*, for the company.

Judgment. JESSEL, M.R.:—

I refuse these costs, and I will state my reasons for doing so.

I by no means assent to the proposition that creditors appearing on a petition to wind up a company are entitled to their costs as of right. It is usual to give one set of costs when many appear, and when there is a reasonable ground for appearing; but I have said before, and I repeat it, that I will not lay down any such rule as that creditors are entitled to their costs as of right, because that would induce solicitors to instruct counsel simply for the purpose of obtaining costs, and for no other purpose whatever.

Here is a creditor for £32, as to whose debt there was not a question; he had the personal liability of the gentlemen who

employed him to prepare a balance-sheet. It is not alleged that they are insolvent or unable to pay the money, or that he could not have recovered his money as a matter of course. Besides that, he was offered—though he was not bound to accept it—a personal guarantee from gentlemen who are alleged neither to be insolvent nor unable to pay the £32, and against whose position there is not even a suggestion.

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Notwithstanding all that, with the certainty of getting his money from those individually liable to him, he chooses to instruct counsel to appear simply to ask for costs and nothing else. It is utterly immaterial to him whether the winding-up is under supervision, or compulsory, or whether there is any winding-up at all; his debt is equally safe in any case.

I wish to discourage the practice as much as lies in my power of solicitors instructing counsel to appear on these petitions merely for the purpose of getting costs, and for no useful purpose except to themselves individually, and therefore I refuse these costs.

Solicitors: *A. H. Miller; H. A. Edgar; Burton, Yeates, & Hart; Oehme & Summerhays.*

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## *In re* MUTLOW'S ESTATE.

M. R. 1878 Dec. 9.

*Practice—Lands Clauses Consolidation Act*, 1845, *ss.* 85, 87—*Railway Company—Landowner—Bond—Breach of Condition—Deposit—Right to petition for Payment out.*

Where a railway company, prior to entering upon lands, has made a deposit in the bank and given a bond under sect. 85 of the *Lands Clauses Consolidation Act*, 1845, the Court has jurisdiction, under sect. 87, in the event of the non-performance of the condition of the bond, to order payment out of the deposit to the landowner on a petition presented by him for that purpose adversely to the company.

Statement.

A railway company being desirous of taking possession of certain land belonging to the Petitioner, a landowner, and being unable to agree with him as to the amount of compensation, had the land valued by a surveyor under the 85th section of the *Lands Clauses Consolidation Act*, 1845, and paid the amount of the valuation,

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£1514, into the *Bank of England*. The company also gave to the Petitioner the usual bond under the 85th section conditioned for payment to him or for deposit in the bank of such purchase-money or compensation as might be determined to be payable, together with interest at 5 per cent. from the time of the company's entry on the land.

In June, 1878, the company took possession, and afterwards the sum of £1653 was awarded by arbitrators appointed under the *Lands Clauses Act* as the amount of purchase-money and compensation payable by the company.

The Petitioner then delivered to the company an abstract of his title, but the company having taken no steps to complete the purchase, beyond laying the abstract before counsel to advise on the title, and there being a balance of £139 due to the Petitioner in excess of the deposit, he now presented a petition asking that the deposit might be paid out to him in part payment of his purchase-money, and for his costs, he undertaking to convey upon payment of the deposit and of the balance of £139, together with interest on the purchase-money.

No conveyance had been actually tendered by the Petitioner to the company, but he had made repeated applications to the company to complete, though without success.

Argument.

*Geare*, for the Petitioner :—

The company having failed to perform the condition of their bond, I am entitled, under the 87th section of the Act, to have the deposit paid out to me.

*J. G. Wood*, for the company :—

I submit, as a preliminary objection to this petition, that it is irregular. Even if the condition of the bond has been broken, which I deny, still the Court has no jurisdiction to order payment out of the deposit to the landowner adversely to the company. The company must either be a co-Petitioner or consent. If the landowner had obtained a judgment in an action creating a lien or charge on the fund, then no doubt he might present such a petition adversely to the company, but not otherwise.

[JESSEL, M.R. :—According to the Forms Nos. 24 and 25, in

*Seton* on Decrees (1), the petition may be presented either by the landowner or by the company.]

I submit that according to the terms of the 87th section the application should be made either by the company, or, if by the landowner, then with their consent.

[*Ex parte Flower* (2), *In re Neath and Brecon Railway Company* (3), and *Ex parte Morris* (4) were referred to.]

JESSEL, M.R.:—

Judgment.

The real question that is raised now is one which I thought had been already settled by practice, and which I am still of opinion has been settled at all events to this extent, that an order of this kind has been made on the application of the landowner; but the question remains whether such an order can be made adversely to the railway company, or can be made only with their consent, or at least without opposition on their part.

I have known cases in which, the company not having been able to pay their purchase-money, application has been made by the landowner for payment out of the deposit to him, but whether or not the application has been made with the consent of the company, I do not recollect. There seems to be no express authority as to what the practice should be. I cannot treat *Ex parte Flower* as an authority upon the point, nor *In re Neath and Brecon Railway Company.*

The real question then is, what is the meaning of the Act? The Act did this: it entitled a railway company to take possession of a man's land against his will without previously paying for it, but it secured the payment of the purchase-money in two ways: first, it required a bond to be given by the company conditioned for payment of the purchase-money—I am speaking now of the case of an absolute owner—and, secondly, it compelled the company to pay the value of the land into the bank, for the purpose of securing due payment to the landowner. So that the landowner had a double remedy—a double security—and I should have thought that the Legislature must have intended to make that security available somehow or other.

First, then, he could sue on his bond; but, if the company were

(1) 3rd Ed. pp. 1074, 1075.
(2) Law Rep. 1 Ch. 599.
(3) Law Rep. 9 Ch. 263.
(4) Ibid. 12 Eq. 418.

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not able to pay, his suing on the bond would be of very little use; and so the Legislature must have thought, because they gave him the additional security of ordering the money to be paid into the bank.

Now, the argument on behalf of the company is that this Act having thus provided a security for the landowner by ordering the money to be deposited, that security is to be entirely nugatory and useless unless the company itself applies for payment out of the deposit to the landowner. If that is so, then the security would undoubtedly be useless, because in the only case in which the landowner would want the money, that is, in the event of the company's insolvency, he could not get it without waiting for the company to enforce the security against itself. I should be very indisposed to put such a construction upon the Act if it was fairly open to any other.

It seems to me that as the deposit stands as a security for the landowner's benefit in case the company is unable to pay, he is the proper party to make the application; and on reading the section, the 87th, I think that is the right construction.

Here I will just observe that a railway company in constructing its works often causes such destruction and injury to the land that it becomes, for all practical purposes, wholly or almost valueless; so that, were it not for this section, the landowner might really have no remedy whatever by which he could recover his purchase-money.

The section begins, "The money so deposited as last aforesaid shall remain in the bank, by way of security to the party whose lands shall so have been entered upon for the performance of the condition of the bond to be given by the promoters of the undertaking, as hereinbefore mentioned."

That is the first part of the section. The money is to remain in the bank by way of security for the performance of the bond. What does that mean? Does it mean a security which can never be made available except by the consent of the party bound?—a security that can never be made available by that party alone for whose benefit it was given? Impossible! Stopping there, I should have felt no hesitation in coming to the conclusion that the landowner alone was intended to be the party to apply to have his security enforced by payment out to him of the deposit.

The section then goes on, "And the same may, on the application by petition of the promoters of the undertaking, be ordered to be invested in bank annuities or Government securities and accumulated; and upon the condition of such bond being fully performed, it shall be lawful for the Court of Chancery in *England* or the Court of Exchequer in *Ireland*, upon a like application, to order the money so deposited, or the funds in which the same shall have been invested, together with the accumulation thereof, to be repaid or transferred to the promoters of the undertaking."

That is all perfectly definite and intelligible. If the bond is performed the only party interested in the money deposited is the company, and it is therefore the company who is to make the application. The money is only deposited for the security of the landowner, and the condition of the bond being wholly satisfied, the only party entitled to the money is the party who paid it in.

Then the section says, "Or if such condition shall not be fully performed, it shall be lawful for the said Court to order the same to be applied in such manner as it shall think fit for the benefit of the parties for whose security the same shall so have been deposited."

The section does not say upon whose petition it is to be so applied, I agree; but on whose petition should it be? Who is the proper party to apply? Why, clearly the person entitled to the benefit of the security; clearly the person who is to have the advantage given by the section, that is to say, the application of the money for his benefit. For that reason the words "upon a like application" are omitted from this latter part of the section.

It is therefore clear, in my opinion, that this petition may be presented by the landowner; that he is the proper party to present it, and that he may present it adversely to the company.

His Lordship then, having heard the petition upon the merits, dismissed it on the ground that a breach of the condition of the bond had not yet been proved; but, as it appeared that the delay in the completion of the purchase was owing to the company's negligence, his Lordship dismissed the petition without costs.

Solicitors: *Geare & Son; Sutton & Ommanney.*

M. R.

1878

Dec. 13.

## DEAN *v.* WILSON.

[1873 D. 87.]

*Practice—Sale by Order of Court—Conduct of Sale—Right of any Party to advertise Sale.*

When a sale has been directed by the Court, and the conduct of it given to one party, no other party has a right to interfere in any way in the sale without the leave of the Court.

Thus, where the Court directed a sale and gave the conduct of it to an independent solicitor, both Plaintiff and Defendant having liberty to bid, the Plaintiff was restrained by injunction from issuing and circulating advertisements that the sale was about to take place.

Statement.

THIS was an action for the sale or partition of the *Dunkirk Salt Works*, in *Cheshire*, the property of the Plaintiff and the Defendant, who were partners. Both desiring a sale, a decree for that purpose was made on the 2nd of June, 1874, the conduct of the sale being given to the Plaintiff, and the Defendant having liberty to bid.

Under an order of the 12th of November, 1875, made upon the application of the Plaintiff, he offering to give up the conduct of the sale, the sale was ordered to be conducted by an independent firm of solicitors in *Liverpool* agreed upon by the parties, the Plaintiff being given liberty to bid.

The property had not yet been put up for sale, but the particulars and conditions were in course of preparation.

The Plaintiff had recently, without the consent of the Defendant, or the authority of the solicitors having the conduct of the sale, circulated advertisements in *America* notifying that the sale was about to take place, and had also circulated in *Liverpool* and in the neighbourhood of the saltworks large printed placards announcing that the property was "to be sold by auction by order of the High Court of Chancery, due notice of which will be given," and that particulars and further information could be obtained by applying to the Plaintiff or his solicitors.

The Defendant applied to the Plaintiff to withdraw the advertisements and placards, and, as he refused to do so, now moved

for an injunction to restrain him from printing, publishing, circulating, or distributing any advertisement, placard, or other document announcing or giving notice of the sale, other than the printed particulars and conditions of sale, and such other (if any) document or documents as might be issued by or under the authority of the solicitors having the conduct of the sale.

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Argument.

*Roxburgh*, Q.C., and *C. Parke*, for the motion:—

What the Plaintiff is doing amounts to a direct interference with the authority of the solicitors who have been entrusted by the Court with the conduct of the sale, and who are therefore the only persons entitled to take the necessary steps for the purpose.

[They were stopped by the Court.]

*Southgate*, Q.C., and *Bardswell*, for the Plaintiff:—

Announcing a sale is not necessarily an interference with it. We have done nothing more than announce the fact, which is true, that the sale is about to take place. It has never been held, as far as we are aware, that such a proceeding is in any way irregular or improper.

Judgment.

JESSEL, M.R.:—

No proposition is clearer than this, that when a sale is directed by the Court and the conduct of it given to one party, no other party has a right to interfere in the conduct of that sale without the leave of the Court.

There is no more important part of the conduct of a sale than the time and method of advertising it. The price very often depends entirely upon the mode in which the sale is advertised; and it is usual, when those who have the conduct of the sale think of advertising, for them to apply to the Judge in Chambers for his directions, so important is the matter considered.

In this case both parties to the cause, being partners, had liberty to bid; and in accordance with the practice of this Court—I say "of this Court," for the practice was established certainly in the time of my predecessor, and probably in the time of his predecessor—when that event happens the conduct of the sale is not given to either party, but is placed in the hands of a solicitor

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nominated or agreed to by both parties or by the Court, and in the hands of an independent auctioneer agreed to or nominated in like manner. That has been done in the present instance. The sale has been put in the hands of most respectable and well-known solicitors in *Liverpool*, against whom I have not heard a word. It is perfectly intolerable that the party who has lost the conduct of the sale because he has liberty to bid, should actively interfere in the conduct of the sale by advertising the property without the leave of the Court, as this Plaintiff has done. He has advertised the property "to be sold by auction by order of the High Court of Chancery, due notice of which will be given"—which he has no right to do.

The fact of a property being in the market, and known to be in the market, sometimes damages a sale. However, whether it damages it or benefits it, the Plaintiff in this case has no right to interfere: the consideration for the liberty to bid was his giving up the right to conduct the sale, and he has no longer any right to interfere in the conduct of it.

Nothing, in my opinion, can be plainer or less requiring authority than this—that the Court is bound at the instance of the other party to restrain any such proceeding, and I restrain the Plaintiff's proceedings in this case simply upon this ground.

There will therefore be an injunction in the terms of the notice of motion, with costs.

Solicitors: *F. Venn & Son*, agents for *John Quinn & Sons, Liverpool; Cunliffe & Beaumont*, agents for *Pemberton, Sampson, & James, Liverpool.*

## KINNAIRD *v.* WEBSTER.

V.-C. B.
1878
Nov. 22, 23.

[1878 K. 42.]

*Debtor and Creditor—Principal and Surety—Current Account at Bankers—Appropriation of Payments—Guaranteed and unguaranteed Debt.*

A customer borrowed from his bankers £2000, which was placed to the credit of his current account, and to secure the debt gave them ten promissory notes payable at intervals of a week. At the same time a friend of the borrower wrote to the bankers as follows:—

"You having this day at my request placed the sum of £2000 to the credit of Mr. *C.'s*" (the borrower's) "account with you, in the event of his promissory notes and interest or any of them representing that amount not being paid at the due dates, I hereby undertake, upon demand, to secure payment of the same," by a mortgage of certain specified property.

On the first five due dates, the sums represented by the first five notes respectively, were debited by the bankers to the customer in the current account; and on each of the first two due dates enough cash was paid in to the account in the course of the day to liquidate the amount of the note. On the remaining three days the balance throughout the day was against the customer. The amounts of the last five notes were not entered by the bankers in the account at all. The payments in to the credit of *C.* to his current account and to another special account after the last note became due, were sufficient to cover all debits up to and including the last note; but the accounts were during all this time overdrawn:—

*Held*, that the bankers were bound to apply all moneys paid in first to the notes secured by the surety which had fallen due; and that the debt was, moreover, discharged, on the principle of *Clayton's Case* (1).

### TRIAL OF ACTION.

Statement.

On the 26th of October, 1877, *Frederick Balsir Chatterton*, a customer of the Plaintiffs, Lord *Kinnaird* and others, a firm of bankers carrying on business as "*Ransom, Bouverie, & Co.*," borrowed from them £2000; and to secure repayment of the same and interest gave them nine promissory notes for £200 each, and one for £250, dated respectively the 7th, 14th, 21st, and 28th of January, the 4th, 11th, 18th, and 25th of February, and the 4th and 11th of March, 1878.

At the time of the advance the Defendant *Benjamin Webster* signed and gave to the Plaintiffs a letter in the following terms:—

(1) 1 Mer. 605.

V.-C. B.

1878

KINNAIRD v. WEBSTER.

Statement.

"*London*, 26th Oct., 1877.

"To Messrs. *Ransom, Bouverie & Co.*

"Gentlemen,—You having this day at my request placed the sum of £2000 to the credit of Mr. *F. B. Chatterton's* account with you, in the event of his promissory notes and interest or any of them representing that amount not being paid at the due dates, I hereby undertake, upon demand, to secure the payment of the same by a mortgage upon the *Adelphi Theatre* and other properties more particularly described in a deed of the 5th of July, 1876, of which a copy has been handed to you by Mr. *F. B. Chatterton;* the mortgage to be prepared in all things to your satisfaction, and at my expense.

"I am, Gentlemen,

"Your obedient servant,

"*B. Webster.*

"Witness, *Richard Churchill.*"

*Chatterton* had two accounts with the bank, one his general account and the other a special account. Except for a short time after the loan, both accounts were constantly overdrawn, but the aggregate credits were sufficient to satisfy all liabilities up to and including the last of the notes.

On the 27th of October, 1877, the Plaintiffs credited *Chatterton's* general account in their books with the £2000. On the 7th and 14th of January they debited the same account with £200 to "*Ransom,*" and on the 21st and 28th of January, and again on the 4th of February, they debited the same account with £200 as "further instalment of," or as "part payment of" the loan.

On the 7th of January the balance in the morning was over £200 in *Chatterton's* favour. On the 14th of January the account was in the morning against *Chatterton,* that is to say, it was overdrawn to the amount of £133 odd, but enough was paid in in the course of the day to liquidate the £200; and the Plaintiffs admitted that according to their custom these two sums of £200 would be considered as paid.

On all the subsequent due dates, the balances both in the morning and at the close of each day were considerably against *Chatterton.*

In consequence of advice received by the Plaintiffs, they did

not enter in *Chatterton's* general account any of the sums due on the bills after the 4th of February.

On the 26th of March, 1878, the Plaintiffs made a demand on the Defendant to execute to them a mortgage for the sums owing to them on the promissory notes, which the Defendant refused to do; and on the 17th of April the writ was issued.

In the statement of claim it was asserted that all the notes had fallen due, but that *Chatterton* had "not paid the same, or any of them, and the whole of the sums secured thereby, amounting in the aggregate to the sum of £2050, remains owing to the Plaintiffs."

The Plaintiffs claimed a declaration that by virtue of the agreement of the 26th of October, 1877, the Plaintiffs, upon such demand being made by them upon the Defendant as aforesaid, became entitled to a charge upon the *Adelphi Theatre*, and all other properties described in the deed of the 5th of July, 1876, for the sum of £2050 and interest; and that the Defendant might be ordered to execute a proper mortgage for that amount.

The defence stated that the Defendant signed the document "for the purpose of giving to the Plaintiffs security that moneys would be paid into the banking account sufficient to repay the said advance, or to meet the said promissory notes at maturity, and as guarantee for" *Chatterton* to this extent, and not otherwise. Further, that the Plaintiffs "in fact received" from *Chatterton* "moneys sufficient and more than sufficient" to pay the notes at their due dates; that "both before and after the due dates" the Plaintiffs had moneys of *Chatterton*, "which they were bound to apply in payment of the same;" that the notes were given for securing the repayment of the £2000 advance which had long since been repaid; and that the debt which the Defendant agreed to guarantee had been released and discharged.

The reply alleged, that "it was never agreed or intended that moneys paid in by" *Chatterton* to the account, "should be retained or applied in payment of the sums secured by the promissory notes;" that there never was any agreement or understanding that the moneys to take up the promissory notes should be paid into the account; that *Chatterton* never appropriated any of the moneys paid in by him to the payment of the sums secured by the

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notes; and that the Plaintiffs were not bound to appropriate, and had not appropriated, any of such moneys to the payment of the said sums, or any of them.

The last-mentioned statements were supported by the affidavit of one of the Plaintiffs, who deposed that "the moneys paid in to the said accounts were not available for payment of the advances for which the said promissory notes were given, or for paying the said notes, and it was not agreed or intended that they should be so available. Such moneys were required by the said *F. B. Chatterton* for the purpose of carrying on his theatrical businesses, and if the Plaintiffs had impounded any of such moneys and refused to honour the said *F. B. Chatterton's* cheques, he would doubtless have ceased to pay any moneys into the Plaintiffs' bank."

In cross-examination, the witness deposed that the notes were entered in the account pursuant to custom, and that, if on any due day there had been a balance in the customer's favour, witness would have honoured his cheque to that extent, though the £200 would have turned the balance against the customer. If at any subsequent date the account came right the money was treated as paid on the day it was entered.

Argument.

*Borthwick* (Sir *H. Jackson*, Q.C., with him), for the Plaintiffs:—

The question substantially is, whether the rule in *Clayton's Case* (1) does or does not apply.

The course of dealing between the Plaintiffs and Defendant was well known to the Defendant. He knew that the Plaintiffs must honour Mr. *Chatterton's* cheques; and to hold that it was the intention of the parties that every shilling of money paid in by *Chatterton* was to be impounded first to satisfy these promissory notes, would lead to an absurdity.

The rule in *Clayton's Case* is, that the debtor may appropriate his payment to either debt he chooses; failing appropriation by the debtor, the creditor may appropriate; and failing appropriation by either, the Court will attribute the payment to the unpaid debt which is first in point of date. Here the customer, Mr. *Chatterton*, certainly made no appropriation. It was open then to the

(1) 1 Mer. 605.

Plaintiffs to appropriate the payments, and they did so, by applying the moneys paid in to reduction of the balance on the general account.

*Hemming*, Q.C., and *W. Phipson Beale*, for the Defendant:—

It is clear there was no agreement—only an understanding is alleged—between the Plaintiffs and *Chatterton* as to how these moneys were to be applied; and between the Plaintiffs and *Webster* there was not even an understanding. There having been no appropriation either by payer or payee, the rule in *Clayton's Case* (1) applies.

Independently of that, wherever, as here, there are two debts, one guaranteed, the other not guaranteed, and there is no appropriation by the debtor who pays the money, the creditor is bound to appropriate the payment first to the guaranteed debt: *Pearl* v. *Deacon* (2).

Moreover *Clayton's Case* applies because for this purpose the two accounts are to be treated as one. It has been held that if a bank has two branches, and a man has an account at each, one overdrawn, the other not, the bankers may combine the accounts and charge the latter account with the debt: *Garnett* v. *M'Kewan* (3).

Where there has been no actual appropriation, mere ignorance of the law will not exclude the operation of the rule: *Merriman* v. *Ward* (4); *Bank of Scotland* v. *Christie* (5); *In re Boys* (6).

*Borthwick*, in reply:—

The mere entry of the first five sums of £200 by the bankers in the general account in their own books would not be binding on *Chatterton* until such entry was communicated to him: *Simson* v. *Ingham* (7); consequently the whole debt is due; but if the Court should be of opinion that the entries in the general account had the effect of extinguishing the first five debts, there still remain five other instalments of the debt clearly unsatisfied.

(1) 1 Mer. 605.
(2) 1 De G. & J. 461.
(3) Law Rep. 8 Ex. 10.
(4) 1 J. & H. 371.
(5) 8 Cl. & F. 214, 226.
(6) Law Rep. 10 Eq. 467.
(7) 2 B. & C. 65.

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BACON, V.C.:—

As to the first two instalments of the debt, it appears that by the act of the bankers they were entered in the account, and I must assume that, with the consent of the debtor *Chatterton*, these sums were treated as paid. If at any time during the day on which these sums were entered in the account, sufficient cash came in to liquidate them, there can be no doubt they must be treated as paid off.

With respect to the next three instalments, there appears to have been no specific appropriation. The bankers carried the amounts into the account as debts due to them, but sufficient money did not come in to liquidate them, and evidently there was no appropriation other than the written figures in the account and in the pass-book.

The remaining five instalments were not entered in the account at all.

The real question, therefore, to be settled turns upon the written contract between the parties. Mr. *Chatterton* was a customer of the bank. His account required strengthening; and thereupon this agreement was come to. [His Lordship read the letter, and continued:—]

That is a security given in favour of the account, and with immediate reference to the account, and the real sense and meaning of the writer of the letter is, that "if, in the course of this transaction, *Chatterton* pays you, the bankers, anything, you must not charge it against me."

*Pearl* v. *Deacon* (1) is a direct authority for the proposition that any payment in is to be appropriated first to the secured debt. In *Pearl* v. *Deacon* a tenant borrowed money of his landlord on the security of goods, and a surety joined in the obligation. The landlord exercised his common law right of distress against the goods, and it was held that he could not thereby derogate from the right of the surety to the benefit of the security. By seizing the goods which were the surety's security, the landlord, to that extent, extinguished the obligation in which the surety was bound. Is not this a similar case? The surety knows there is a current

(1) 1 De G. & J. 461.

account, and stipulates that if any money comes in his suretyship shall be released.

The Plaintiffs' contention is that it was agreed that the notes should be treated as paid up, only in case there should be a balance in favour of the bank when the notes fell due. The amount of the notes was to be written off only against a balance. But this view is not consistent with the evidence. The evidence shews that whatever may have been the state of the account at the due dates of the notes, whenever at any date there came in enough to satisfy the notes, they were to be treated as paid off, and the liability of the surety was to be at an end.

The doctrine of appropriation, as laid down in *Clayton's Case* (1), is quite familiar. If the payer appropriates the payment, the payee must rest content with that destination of the money; if he does not appropriate the payment, the payee may do so; if neither the one nor the other appropriates, then whenever at any time sufficient comes in to liquidate prior debts, they are satisfied in order of date.

The principle of law is quite plain; the facts also are perfectly plain. I think the case fails against Mr. *Webster*, because the Plaintiff himself has proved that at various dates after the notes fell due, there came in enough to pay the amounts, and if they are paid, the liability of the surety is at an end.

The claim fails, and the bill must be dismissed with costs.

Solicitors: *Burrows & Barnes; Webster & Graham.*

(1) 1 Mer. 605.

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1878

Nov. 26.

## COMFORT *v.* BROWN.

[1877 . C. 396.]

*Will—Construction—Ultimate Remainder, after Life Estate in S., and Estate Tail in the Children of S., "in default of issue" of S. to the "right heirs" of S. "for ever"—Effect of Bequest of Leaseholds under the same Limitations.*

A testator, by will made in 1820, devised and bequeathed freeholds and leaseholds together to his daughter *S.* for life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, and "in case of default of issue" of *S.*, to "the right heirs" of *S.* "for ever."

*S.* having married and died a widow, without having had a child:—

*Held*, that she took an absolute interest in the leaseholds.

*Herrick* v. *Franklin* (1) explained.

Statement.

### SPECIAL CASE.

*John Horner*, of *Leytonstone, Essex*, by his will, dated the 16th of October, 1820, duly executed and attested for the devise of real estate, devised certain copyhold hereditaments at *Saul's Green, Leytonstone*, to his daughter *Sarah Charlotte Noone* for life, with remainder to trustees to preserve contingent remainders, remainder to the first and every other son of the body of the said *Sarah Charlotte Noone* successively in tail, and in default of such issue, to the use of all and every the daughters of the said *Sarah Charlotte Noone* as tenants in common in tail; and in default of such issue, "unto the right heirs of the said *Sarah Charlotte Noone* for ever."

Testator then bequeathed a leasehold house and premises known as the *Coach and Horses* public-house, at *Mile End, Middlesex*, three freehold cottages, and two acres of freehold land, to his daughter *Sophia Horner* and her assigns for life, without impeachment of waste, free from the control, debts, or engagements of any husband she might marry, remainder to the trustees before named to preserve contingent remainders, and after the decease of his said daughter *Sophia Horner* he gave and devised the said cottages, land, and public-house in the following terms:—

(1) Law Rep. 6 Eq. 593, 596.

"In like manner and under and subject to the like limitations unto or for the benefit of the sons and daughters of the said *Sophia Horner*, and their respective issue as are hereinbefore expressed, mentioned, and declared as to the devise of my said copyhold messuage or tenement at *Saul's Green* aforesaid, and in case of default of issue of my said daughter *Sophia Horner*, I give and devise the same cottages, lands, and public-house to the right heirs of the said *Sophia Horner* for ever."

The testator died on the 2nd of May, 1822, and the will was proved in the course of the same month.

*Sophia Horner* married *Walter Leigh Levy*, who died in 1855. There were no children of the marriage.

*Sophia Levy* died on the 9th of February, 1875, having by will dated the 10th of February, 1870, devised and bequeathed the above-mentioned three freehold cottages and two acres of freehold land, and also the above-mentioned leasehold public-house and premises, and all other her freehold, copyhold, and leasehold estates, and all her personal estate, to her nephew *Walter Horner Brown*, upon trust to sell and convert, and out of the mixed fund to pay her debts, funeral and testamentary expenses and legacies, and then to pay one-sixth of the residue to her nephew *William Henshaw Comfort*, and to retain the remaining five-sixths for his, *Walter Horner Brown's*, own use.

Mrs. *Levy's* heir-at-law was *Thomas Horner*.

The case was stated for the opinion of the Court by *William Henshaw Comfort* as Plaintiff, against *Walter Horner Brown*, the executor, and *Thomas Horner*, the heir-at-law, submitting the following questions:—

1. Whether, under the will of *John Horner*, *Sophia Levy* took such an interest in the leasehold property at *Mile End* thereby devised and bequeathed as she could devise or bequeath by will?

2. Who in the event of the said *Sophia Levy* not taking such interest as aforesaid became entitled to the said leasehold property on her decease?

3. How and out of what property the costs of this case ought to be paid?

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Argument.

Sir *H. Jackson*, Q.C., and *Freeling*, for the Plaintiff:—

Mrs. *Levy* took a devisable interest in these leaseholds.

Where there is a devise of leaseholds "for such estate and estates, and in such manner and form" as the real estates have been given—and the gift of the real estates is to *A.* for life, remainder to trustees to preserve, remainder to the heirs of the body of *A.*—*A.* takes an absolute interest in the leaseholds: *Brouncker* v. *Bagot* (1). So that had there been in this case no devise of the leaseholds in case of default of issue of *Sophia*, she would have taken an absolute interest.

Then what is the effect of the gift over? There were no children of the marriage; hence, according to *Evers* v. *Challis* (2), it was a contingent remainder, not an executory devise, and hence would enlarge the preceding estate to an absolute interest.

*Mackeson*, Q.C., and *Phear*, for the first Defendants:—

On behalf of the executor we claim the leaseholds as part of Mrs. *Levy's* estate.

By the testator's will these leaseholds are blended with certain freeholds, and the freeholds are devised to *Sophia* for life, remainder to her sons successively in tail, remainder to her daughters as tenants in common in tail, and in default of such issue to the right heirs of *Sophia*. As to the freeholds, this devise has been held to be an ultimate contingent remainder to *Sophia* in fee. Now, as to leaseholds, it has often been held that what gives an inheritance in fee or in tail in freeholds, whether the words be "heirs of the body" or "heirs," will give an absolute interest in leaseholds: *Roper* on Legacies (3), cited in *Williams* v. *Lewis* (4). This view is supported by *Gittings* v. *McDermott* (5), referred to with approval by Lord *St. Leonards* in *De Beauvoir* v. *De Beauvoir* (6). When the word "issue" is used, some modification of the rule has been admitted: *Ex parte Wynch* (7).

Another well-established rule is, that words importing a failure of issue, even without the word "such," refer to the class or classes

(1) 1 Mer. 271; 19 Ves. 574.
(2) 7 H. L. C. 531.
(3) Ed. of 1847, p. 1522.
(4) 6 H. L. C. 1013, 1020.
(5) 2 My. & K. 69, 79.
(6) 3 H. L. C. 524, 557.
(7) 5 D. M. & G. 188.

of issue before mentioned: *Jarman* on Wills (1); *Lewis* on Perpetuities (2); *Theobald* on Wills (3); *Evers* v. *Challis* (4); *Baker* v. *Tucker* (5); *Smyth* v. *Power* (6); *Foster* v. *Hayes* (7).

*Swanston*, Q.C., and *Chester*, for the second Defendant:—

The heir-at-law of Mrs. *Levy* takes as *persona designata*. The cases cited no doubt shew that where there is a blended gift, and in the freeholds an estate tail is taken by virtue of the rule in *Shelley's Case* (8), there, in leaseholds, an absolute interest will be taken by the same words; but it is different where the estate taken in the freeholds is an estate in fee. In *Herrick* v. *Franklin* (9), Vice Chancellor *Giffard* said, "I cannot assent to such a proposition of law as that where real and personal estate are blended, the personalty goes as the realty. Such a proposition is, I think, bad law, and authority is the other way. There is no authority for holding that because the rule in *Shelley's Case* applies to real estate, it is to be applied to personal estate also." So that by these words a life estate only is given to *Sophia Horner*.

Then, to whom is the property given after the death without issue of *Sophia Horner?* To the "right heirs" of *Sophia* "for ever." The word heirs cannot be divided, hence the devisee is the heir at law: *De Beauvoir* v. *De Beauvoir* (10); *Theobald* on Wills (11); *Haslewood* v. *Green* (12); *Hamilton* v. *Mills* (13); *In re Gamboa's Trusts* (14).

The cases cited on the other side are all distinguishable. The rule is thus stated, "If real estate be combined with personalty in a gift to 'heirs,' the difficulty noticed by Lord *Eldon* of giving different meanings to the same words in the same place, affords a strong ground for construing the word 'heirs' in its natural sense, as to both species of property": *Jarman* on Wills (15); *Southgate*

(1) 3rd Ed. vol. ii. 434, 457.
(2) Page 281.
(3) Page 387.
(4) 7 H. L. C. 531.
(5) 3 H. L. C. 106.
(6) Ir. L. Rep. 10 Eq. 192.
(7) 2 E. & B. 27; 4 E. & B. 717.
(8) 1 Rep. 219.
(9) Law Rep. 6 Eq. 593, 596.
(10) 3 H. L. C. 524.
(11) Page 225.
(12) 28 Beav. 1.
(13) 29 Beav. 193.
(14) 4 K. & J. 756.
(15) 3rd Ed. vol. ii. p. 73.

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Argument.

v. *Clinch* (1); *Mounsey* v. *Blamire* (2); *Gwynne* v. *Muddock* (3); *Boyd* v. *Golightly* (4); *Theobald* on Wills (5).

*Mackeson*, in reply:—

The remarks of Vice-Chancellor *Giffard* in *Herrick* v. *Franklin* (6) cannot have been intended to abrogate the general rule that what constitutes an estate of inheritance in freeholds gives an absolute interest in leaseholds.

Almost all the cases cited on the other side were upon the construction of the word "heirs" of the testator, not "heirs" of the tenant for life.

Judgment.

BACON, V.C.:—

I have listened to the arguments in this case with all the interest which their ingenuity deserves, but I cannot say that I entertain any doubt about the answer which ought to be given to the first and important question raised upon the special case.

Mr. *Swanston*, in the course of his argument, said that any layman reading this will would not entertain much doubt about its meaning. What does that amount to? It means this, that a man, with ordinary perception, acquainted with a knowledge of the language used, would on reading this will be able to tell what the testator meant. The universal rule of construction is that you are to give effect to the intention of the testator. The whole argument which has been addressed to me has been in order to shew that there are some technical rules which forbid the Court from applying that wholesome common-sense rule to the construction of this will.

Now let us consider what the will is. A man having to provide for his two daughters leaves to one daughter certain copyhold property for her life, with limitations over in tail, and then, subject to those limitations and upon their failure, he gives the property "unto the right heirs" of the daughter "for ever." Then besides, having to deal with another portion of his property, some of it

(1) 27 L. J. (Ch.) 651; 4 Jur. (N.S.) 428.
(2) 4 Russ. 384.
(3) 14 Ves. 488.
(4) 14 Sim. 327.
(5) Page 167.
(6) Law Rep. 6 Eq. 593, 596.

being freehold and some of it leasehold, he blends (a word which I do not use without intending to give to it its full signification) the properties together—that is to say, he makes them one subject of bequest, and he gives them in like manner to his other daughter, *Sophia Horner*. The same provision is made for each daughter, and in each instance in case of the provisions which he had made for the issue of his daughter failing, then he gives to each of his daughters what? In the plainest words, he gives the most absolute unqualified interest in the property to the two several subjects of his devise.

The cases are, no doubt, extremely numerous upon the subject, but there is no case which does not establish the rule that you may apply the rule in *Shelley's Case* (1) to a gift of personalty—that although the rule is drawn from principles of feudal law, it is no less applicable to gifts of personalty. If that is the rule, then here there is a plain gift of personal estate mixed up and blended with real estate, but which is to go in that blended condition according to the direction of the testator and to the persons upon whom he has bestowed it. It has not been argued on the other side that there is any serious doubt about the application of the rule in *Shelley's Case* as to the real estate, but it is said that there is no instance in which the same rule has been applied to personal estate. *De Beauvoir* v. *De Beauvoir* (2) and *Gittings* v. *McDermott* (3) are instances; and there are hundreds of other instances in which the same rule has been applied in the same manner to personal estate. But it is said that there was a case of *Herrick* v. *Franklin* (4), before the late Lord Justice *Giffard*, when Vice-Chancellor, in which a contrary decision was come to. No one can hear the name of Lord Justice *Giffard* mentioned without feeling the utmost respect for any decision of his. No one can doubt his profound knowledge of the law; but I do not think he has decided anything of the kind. The question arising there between real estate and personal estate, the personal estate being given for life clogged with and bound by a trust to apply a portion of it to the maintenance of a lunatic brother—the Vice-Chancellor in effect said: "It is not the time

(1) 1 Rep. 219.
(2) 3 H. L. C. 524.
(3) 2 My. & K. 69.
(4) Law Rep. 6 Eq. 593.

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for me to decide that matter. I will not decide that, because these two things are blended together, these legatees are not at liberty to sell and dispose of the estate which is burdened with this trust. Hereafter when the time comes there may be a question between the persons who lay claim to this bequest, whether it goes to the next of kin or not."

The claim which Mr. *Swanston* has argued for on behalf of the heir-at-law of Mrs. *Levy* is as if he was entitled under the terms of the will. The case seems to me to be perfectly clear. All the cases referred to recognise and establish the rule that there is no difference between real and personal estate in the construction of such a will as this. The object of this testator, plainly expressed in plain words, was, that his daughter *Sophia* should have for her life the whole enjoyment of this blended property, and that the property at her death was to go to her children with the limitations mentioned. He then provides for the event of the death or default of issue, and says that if his property should not go in that direction, then he gives it to *Sophia* absolutely out and out. The question raised upon this special case is, "whether under the will of *John Horner* the said *Sophia Levy* took such an interest in the leasehold property at *Mile End* thereby devised and bequeathed as she could devise or bequeath by will." I can entertain no kind of doubt, not reading it merely as a layman, but reading it with reference to all the authorities which have been cited to me, that Mrs. *Levy* had an absolute power over this property, blended as it was, and that she has exercised that power by her will.

The first question must be answered in the affirmative; and that being so, it becomes unnecessary to answer the second question. The costs will be paid out of Mrs. *Levy's* estate.

Solicitors: *Heather & Sons.*

## BRYANT *v.* BULL.

[1877 B. 499.]

## BULL *v.* BRYANT.

[1877 B. 513.]

V.-C. B.
1878
*Dec.* 5.

*Practice—Sequestration—Receiver in lieu of Sequestration—Judicature Act*, 1873, *s.* 25, *sub-s.* 8.

Plaintiff in an action, which had been followed by a cross-action, obtained an order in both actions that his costs of the cross-action should be paid by the Defendant in the action, a married woman, entitled for life, for her separate use, to the dividends of a sum of stock, standing in the names of trustees, who were not parties to either action. Plaintiff had endeavoured to obtain a sequestration, but failed from not being able to find the Defendant's address so as to serve the subpœna for costs. He then moved the Court for a receiver, under sect. 25, sub-s. 8, of the *Judicature Act*, 1873. After service of the notice of motion, but before the motion was heard, the Defendant made an affidavit, in which her address was set forth:—

*Held*, that the principle of *Anglo-Italian Bank* v. *Davies* (1) applied, and that the Plaintiff was entitled to a receiver; and order made on the hearing of the motion accordingly.

Statement.

MOTION on behalf of *Thomas Bryant*, the Plaintiff in the first action, that he, or some other fit and proper person, might be appointed to receive the dividends due and accruing due on £5106 0*s.* 2*d.* Consols and £5000 New Three per Cent. Annuities, standing in the names of *Charles Bull* and *William Benjamin Paterson*, as trustees of the will of the late *George Bull*, deceased, to which dividends the Defendant *Jane Emma Bull*, widow, was entitled for her life under the said will, until the amount due to *Bryant* under a judgment recovered by him against Mrs. *Bull*, dated the 25th day of March, 1878, with interest, and his costs consequent on the judgment and of the present application should have been fully paid and satisfied; or in the alternative, for a writ of sequestration on production of an affidavit of service on Mrs. *Bull*.

The action and cross-action had been tried, and by the judgment referred to in the notice of motion, which was in both the actions, Mrs. *Bull* was directed to pay to *Bryant* his taxed costs of the

(1) 9 Ch. D. 275.

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second of the actions. The costs had been taxed, and appeared by the certificate, dated the 3rd of June, 1878, to be £46 5*s.* 2*d.*

Applications for payment having failed, a subpœna was on the 13th of June issued for the costs.

*Bryant's* solicitor said he had caused every endeavour to be made to serve Mrs. *Bull*, but that she could not be found, and that the Record and Writ Clerk refused to issue the sequestration without production of an affidavit of service of the subpœna.

The notice of motion was dated the 16th of November, 1878, and was served immediately afterwards. The motion was made on the 21st of November, and was ordered or arranged to stand over until the 28th of November.

Meanwhile, namely, on the 27th of November, Mrs. *Bull* filed an affidavit, describing herself as of an address in *London*. In this affidavit she said that since the date of the judgment she was residing in *Brighton*, and that since the 25th of April, 1878, she had resided in *London;* that her residence had always been known to her solicitors; that she had not evaded service of any process, neither was she aware until the notice of motion was served that a subpœna for costs had been issued.

The affidavit then proceeded to set forth certain charging orders on the fund.

Argument.

Sir *H. Jackson*, Q.C., and *Owen*, for the motion:—

The motion is made under sect. 25, sub-sect. 8, of the *Judicature Act*, 1873, and on the authority of *Anglo-Italian Bank* v. *Davies* (1). The only difference is this, when the notice of motion was served we could not get the fruits of the judgment, because we did not know the Respondent's address. True, we know it now, and the question is whether this knowledge, acquired since the notice of motion was served, debars us from this remedy.

*Byrne*, for the Respondent Mrs. *Bull*.

The motion is misconceived. The first action is still pending; in the second no subpœna for costs has been served upon the Respondent.

The real question is whether the *Anglo-Italian Bank* v. *Davies*

(1) 9 Ch. D. 275.

applies. There an action had been brought; the appointment of a receiver was the only remedy the Plaintiff had; and all proper parties were before the Court. Here the Plaintiff is moving in the absence of the trustees, and of the persons holding the charging orders. The motion is not made, as in the authority cited, in an action instituted for the purpose of having a receiver appointed. The Plaintiff is departing from the regular and proper mode of procedure. He might have obtained a garnishee order under Order XLV., rule 3. That is one remedy; or he might have sued out a writ of sequestration, with leave of the Court to serve by substitution; or he might have obtained a charging order.

Argument.

BACON, V.C.:—

Judgment.

It has been said that this application is irregular. I do not see any irregularity in it.

A rule respecting debts due to the debtor from third persons has been referred to. But there is no garnishee here; there is no attempt here to attach any debt due from a third person. Nor is the thing sought to be attached the subject of suit between these parties; so that the case of a garnishee, that is to say, of a third person who owes money to the debtor, and whose debt is liable to be attached, does not arise.

It has been said that the application is novel. But after reading the report of the decision in the *Anglo-Italian Bank* v. *Davies* (1), I cannot say, although the facts in the particular instance may be novel, that there is any novelty in the principle of the application. The terms of the statute are beyond all doubt, and the comments of the Lords Justices as to the meaning of the statute shew clearly what was meant. From these judgments it appears that the *Judicature Act* confirms, and in some sense expands, the remedies of a judgment creditor. They shew that in a case where the remedy of the creditor was defective, it was the intention of the Legislature to supply that defect. The case may have some features of novelty; but I do not think it is novel in principle, nor that it is marked by any kind of irregularity. The appointment of a receiver is a matter which does not

(1) 9 Ch. D. 275.

V.-C. B. 1878 BRYANT v. BULL. BULL v. BRYANT. Judgment.

concern mortgagees or prior incumbrancers, for a receiver in the exercise of his authority will be obliged to respect former orders of the Court; and the prior incumbrancers will be at liberty to take such proceedings on behalf of their own interests as they may think fit, so that that circumstance occasions no kind of difficulty.

The contention amounts to this—that this lady, being a debtor under a judgment of the Court for the payment of costs, is to retain her interest in this fund, and leave the applicant unpaid. But that is what the law does not permit.

Then it was said that there is a suit regularly constituted, in which proceedings for the recovery might be had, according to the established practice of the Court, possibly either by sequestration, attachment, or a charging order.

It is true there is such a suit, but the sequestration could not be enforced because the Defendant could not be found. There may be other remedies, there may be 500 or 5000 other remedies, but if this one remedy which the applicant has invoked be one of them, there is no reason why he should not have recourse to this one out of the 5000.

The Defendant says she had no intention of evading service. She says that her address was always known to her solicitors. But it is not the less true that applications made to her solicitors were made in vain. She says she had been residing for some time in *Brighton*, and afterwards in *London*. But *Brighton* is a large place; and *London* is a still larger place, and she does not satisfy the Court by saying that she had been living first in one, and then in another of these places, without saying where.

I think the application is one that ought to be granted. There must be a reference to Chambers to appoint a receiver, such appointment to be subject and without prejudice to the prior orders of the Court.

The Plaintiff's costs of this application will be added to the former sum ordered to be paid.

Solicitors: *Harper, Broad, & Battcock; Paterson, Snow, & Bloxam.*

## ANCONA *v.* WADDELL.

V.-C. H.

1878

*Nov.* 18, 19.

[1875 A. 87.]

*Will—Forfeiture Clause—Bankruptcy in Testatrix's Life—Administration Suit —Annulment.*

Testatrix, who died in February, 1875, by her will in February, 1874, bequeathed the residue of her property to trustees to pay the residue of the income in fourths to her sons and granddaughters for life, and there was a clause of forfeiture in case either of the sons or granddaughters should become insolvent or be declared bankrupt.

*W.* (a son) was adjudicated bankrupt in June, 1873. The testatrix was a creditor, and proved in the bankruptcy. In March, 1875, *W.* offered a composition, and it was accepted by the creditors, but the arrangement could not at that time be carried into effect. The trustees under the will filed a bill in July, 1875, for the administration of the trusts, and the usual decree was made in July, 1876. In May, 1878, the composition was agreed upon and approved by the Court in June following, and an order was made for the annulment of the bankruptcy. On further consideration of the cause:—

*Held*, that, upon the principle laid down in *White* v. *Chitty* (1) and *Lloyd* v. *Lloyd* (2), and in *In re Parnham's Trusts* (3), there was not a forfeiture.

21 Ch. D. 282.

Statement.

*CAROLINE MAITLAND*, who died on the 5th of February, 1875, by her will, dated the 13th of February, 1874, gave the residue of her real and personal estate to two executors, their heirs, executors, administrators, and assigns, upon trust that they or the survivor of them should convert the same into money, and invest the whole of her estate in the securities as in the will mentioned. Upon trust, in the first place, out of the income to pay an annuity of £50 to her sister, and as to the residue of the income, to pay one-fourth to her son *Robert Maitland* during his life; one-fourth to her son *Thomas* during his life; one-fourth to her son *William*, the Defendant, during his life, and in case his wife *Jeannie Dillon*, a Defendant, should be living at the time of his death, to pay one-half part of the said one-fourth to her so long as she should remain his widow; and the remaining fourth to her two granddaughters, children of her son *Robert*, equally, during their joint lives, from the time when they should attain the age of

(1) Law Rep. 1 Eq. 372. (2) Law Rep. 2 Eq. 722.
(3) Law Rep. 13 Eq. 413.

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twenty-one years or be married under that age, for their separate use. The will contained a proviso that if any of the persons entitled under the trusts therein declared to any part of the income of the trust estate, other than the sister, should become insolvent or be declared bankrupt, or should assign, charge, or incumber, or attempt or affect to assign, charge, or incumber, other than by any settlement made by the granddaughters on their marriage, his or her share of the income of the trust estate or any part thereof, or should, otherwise than as aforesaid, do or suffer anything whereby the same or any part thereof would through his or her act or default, or by operation or process of law, or otherwise, if belonging absolutely to him or her, become vested in or payable to some other person or persons, then and thenceforward his or her interest in the share of the income should absolutely cease, determine, and be forfeited, and go as thereinafter provided, as well with respect to the original share of the said income thereinbefore limited to him or her during his or her life, as also to any share or shares of such income which might then have accrued, or might but for that clause thereafter accrue under any provision contained in the will: Provided, also, that nothing therein contained should affect the original share of her son *William* in the income of her trust estate so as to deprive his wife of the interest thereinbefore given to her in the events aforesaid in one-half of his original fourth share, which one-half share should, in case of forfeiture under the proviso thereinbefore mentioned, in case the wife of *William* should be living, be paid to her during her life or widowhood. There were trusts in favour of the survivors of the sons and granddaughters whose shares of income should not have become forfeited, and in favour of grandchildren, of the principal moneys. The will empowered the trustees to compound and allow time for the payment of debts due to the testatrix, and to settle all accounts on such terms as they should think expedient, and to refer matters in difference to arbitration, and to postpone the conversion of her estate, and to manage the property.

The testatrix left all the legatees surviving.

On the 7th of December, 1872, a petition in bankruptcy was presented against *William Maitland*, and after various adjournments he was, on the 9th of June, 1873, adjudicated bankrupt.

He prepared a statement of his affairs, and therein he included the testatrix as a creditor, and she, on the 27th of June, 1873, proved against the estate for the balance due to her, and, by proxy, voted at meetings of creditors held before and after the date of her will, for the appointment of trustees.

Statement.

On the 4th of March, 1875, *William Maitland* called a meeting of his creditors, and he made to them a proposal to pay a composition, and it was accepted by the statutory majority, but the proposed arrangement was not carried out in consequence of formal difficulties through a particular creditor delaying to file his account in obedience to an order of the Court. In consequence of the various claims made through the bankruptcy of *William Maitland*, the trustees under the will, on the 14th of July, 1875, filed this bill for the administration of the trusts by the Court, and a decree for that purpose was made in July, 1876.

In May, 1878, the trustee in bankruptcy and creditors agreed to a composition, which was approved by the Court of Bankruptcy, and on the 20th of June, 1878, an order was made for the annulment of the bankruptcy.

The cause came into the paper to be heard upon further consideration at the commencement of the Michaelmas Sittings, but was ordered to stand over, all parties not being ready, and before it came into the paper again a certificate of the annulment of the bankruptcy had been obtained from the proper officer, and the question which arose was whether *William Maitland's* share had become forfeited by his bankruptcy. In consequence of the suit by the trustees, no payment in respect of the share could be made to any one.

Argument.

*Dickinson*, Q.C., and *Cracknall*, for the Plaintiffs, stated the facts of the case, and pointed out that the words in the will were, "should become insolvent or be declared bankrupt, or should assign," referred to the fact that at the date of the will *William Maitland* had already been adjudicated bankrupt, and said the question was whether the language used would justify the Court in holding that there had been a forfeiture, the testatrix herself being aware of the bankruptcy.

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Argument.

*Hastings*, Q.C., and *George Henderson*, for the Defendants, the first being the trustee in bankruptcy, who disclaimed any interest:—

The clause of forfeiture has not taken effect, and looking at the whole of the cases upon the subject, and the doctrine which has been established in *White* v. *Chitty* (1), *Lloyd* v. *Lloyd* (2), and *Smallcombe* v. *Olivier* (3), it is clear that the effect of annulling the bankruptcy is to render the state of things the same as if the bankruptcy had never occurred. In *Trappes* v. *Meredith* (4) Vice-Chancellor *James* (5) said in effect that the decisions had proceeded upon one broad principle that the general intent of a gift of this kind was "the personal enjoyment of the legatee," and if that could not be had by reason of the property being vested in any other person the forfeiture took effect, but otherwise it did not. The gift in this case is a share of income of residue, and there possibly might not have been any, at any rate it had to be ascertained by the trustees, and in the administration by the Court; and long before anything became payable the bankruptcy was annulled, consequently taking the adjudication and the annulment together, the result is, as Vice-Chancellor *James* observes in that case (6), that the whole matter is restored to the state in which it was at the time of the adjudication. It is true that *Trappes* v. *Meredith* was, on appeal, reversed (7); but Lord *Hatherley* (8) approved of the decisions in *Manning* v. *Chambers* (9) and *Seymour* v. *Lucas* (10), and said "that words of futurity in a gift of this description are not to operate so as to defeat the manifest intention of the testator that the gift shall be a personal benefit to the legatee." This case is governed by the authorities which have been referred to, and therefore it is submitted that there has been no forfeiture by the bankruptcy.

*T. L. Wilkinson* appeared for the other sons of the testatrix, and did not oppose their brother's claim.

(1) Law Rep. 1 Eq. 372.
(2) Ibid. 2 Eq. 722.
(3) 13 M. & W. 77.
(4) Law Rep. 9 Eq. 229.
(5) Ibid. 232.
(6) Law Rep. 9 Eq. 233.
(7) Ibid. 7 Ch. 248.
(8) Ibid. 252.
(9) 1 De G. & Sm. 282.
(10) 1 Dr. & Sm. 177.

*MacSwinney*, for the two granddaughters—infants—not parties, but who had been required to appear on the hearing :—

Argument.

This case is governed by the decision in *In re Parnham's Trusts* (1), where the cases of *White* v. *Chitty* (2) and *Lloyd* v. *Lloyd* (3) were distinguished. The test is, has the time come when a payment can be made to a free man ? and it is impossible to say here that a time did not come within the period of four years which has elapsed since the testatrix's death when the trustees could have paid this income to somebody. The reason why no income has been paid is because of the administration by the Court at the instance of those who could have paid the money. But that cannot alter the rights of the parties. There having been a time when *William Maitland* was not a free man, and payment could not be made to him, the annulment now relied upon, the certificate of which has been obtained at the last moment, cannot prevent a forfeiture. This view is supported by the cases of *Trappes* v. *Meredith* (4) and *Cox* v. *Fonblanque* (5).

*Hastings*, in reply.

Judgment.

HALL, V.C. :—

I have looked into the cases and considered the question which was argued yesterday, and it appears to me that, applying the principles which are laid down in the cases of *White* v. *Chitty* and *Lloyd* v. *Lloyd*, and in *In re Parnham's Trusts*, this is not a case in which there has been a forfeiture. I do not consider that the decisions in the case of *Trappes* v. *Meredith*, which was before Vice-Chancellor *James*, and was reversed, and *Cox* v. *Fonblanque*, which were relied upon for the granddaughters, are at variance with my view. I do not consider that the principle laid down in *In re Parnham's Trusts* is at variance with that view : the decision in that case depended upon the particular circumstances of the case. Vice-Chancellor *Wood*, in *Lloyd* v. *Lloyd*, said, referring to the decisions in which language of futurity had been held to embrace cases of actual bankruptcy at the time of the execution

(1) Law Rep. 13 Eq. 413.
(2) Ibid. 1 Eq. 372.
(3) Law Rep. 2 Eq. 722.
(4) Ibid. 7 Ch. 248.
(5) Law Rep. 6 Eq. 482.

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of the instrument, or between that time and the death of the testator (1), "The reason why, in some cases to which I have been referred, the Court has rather strained the language so as to occasion forfeiture, has been to prevent the property passing into hands other than those which the testator intended should receive it." In like manner, the Court will endeavour to interpret the language in favour of the legatee, so as to effectuate what it is manifest the testatrix would have done under existing circumstances.

Of course my observations and my judgment have application only to a case like the present, which is one of residue of income, and where the bankruptcy was annulled (as I consider it was, though the certificate of annulment was not drawn up) within a reasonable time after the death of the testatrix, that is to say, within five months, and before, as I consider, it could be said that there was any actual income of the share which could be treated as payable to, or retained for or appropriated for the benefit of this residuary legatee.

Solicitors: *Watkins, Baker, & Co.; Stopher & Rundle; J. P. Woulfe.*

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V.-C. H. 1878 Dec. 5.

## *In re* BARKER'S ESTATE. HETHERINGTON *v.* LONGRIGG.

[1878 B. 322.]

*Practice—Administration Action—Admissions in Statement of Defence—Notice of Motion for "Decree or decretal Order"—Rules of Court*, 1875, *Order* XL., *rr.* 1 *and* 11—*Direction to pay Cash Balance into Court.*

Upon admissions in a statement of defence in an administration action, and upon a notice of motion for "a decree or decretal order," an order can, under Rules of Court, 1875, Order XL., rule 11, be made upon an ordinary motion without setting down the motion.

Statement.

THIS was an action commenced on the 17th of June, 1878, against the sole trustee and executor of the will of *Ann Barker*, who died in April, 1877, for the administration of her estate, the

(1) Law Rep. 2 Eq. 724.

(Solicitors' Journal, 1878, p. 358.)

appointment of a receiver, and also of an additional trustee of the will. The statement of claim alleged that the testatrix was, at the time of her death, entitled to considerable real and personal estate, and that the Defendant had sold and possessed himself of the proceeds of it, and had in his hands a balance of nearly £20,000, which ought to be invested. In the statement of defence filed on the 8th of August, 1878, the Defendant admitted that he had sold the real estate for £11,735, that he had realized the personal estate, and stated that he had paid and provided for some of the legacies (in the aggregate over £12,000), was ready to furnish his accounts, and was desirous of being discharged from being a trustee. The Plaintiffs, on the 11th of November, 1878, gave notice under Rules of Court, 1875, Order XL., rule 11, that a motion would be made that a decree or decretal order might be made in the action according to the minutes which were appended thereto by way of schedule, or that such other order might be made as the Court should think the Plaintiffs were entitled to.

Clause 4 of the minutes was, that the Defendant should, on or before the 20th of December, pay into Court the £3000 admitted by him to have been set apart as part of the share of one legatee, and also the balance of the sum of £18,674, admitted to have been received by him, after deducting the said sum of £3000 and the other sums mentioned in the statement of defence; but the Defendant was to be at liberty to discharge himself upon affidavit of any sums properly expended or paid by him. The motion was made upon Thursday, the 14th of November, 1878, an ordinary motion day. The Defendant's counsel had not been instructed to appear, and the order was made upon an affidavit of service. Upon the 14th of November the Plaintiffs' solicitor gave notice to the Defendant's solicitors of the order, and upon the 15th of November a correspondence ensued, in the course of which the Plaintiffs' solicitor read a letter from the Defendant's solicitors, in which it was stated that there were substantial objections to the order, and they contended that the action should have been set down in the cause book as a motion for judgment.

This was a motion upon the part of the Defendant that the

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Argument.

order made upon motion for judgment might be discharged for irregularity, or that such other order might be made as might be just and proper.

*W. Pearson*, Q.C., and *Brodrick*, for the motion :—

The proceedings in this action have been altogether irregular and unwarranted by the Orders and Rules. The judgment in such a case could only properly be obtained under Rules of Court, 1875, Order XL., rule 1, which states that "the judgment of the Court shall be obtained by motion for judgment," and the proper course, and which ought to have been pursued here, was for the solicitor of the Plaintiffs to send minutes to the solicitors of the Defendant to be settled, and after that had been done the action ought to have been set down in the paper, and then judgment or decree (*Judicature Act*, 1873, "Interpretation of Terms,") would be moved for on a short cause day, for the execution of the trusts and the payment of the trust-moneys into Court. The terms of the notice of motion and the form of judgment proposed to be taken, shew that motion could not be moved for under Order XL., rule 11, and that is borne out by the Forms of Judgment, No. 7, Appendix D. The order made ought to be discharged, it not being justified by any admissions in the pleadings, or else such an order should be made as may be just and proper.

*Dickinson*, Q.C., and *Colt*, for the Plaintiffs :—

The proceedings in this action have been perfectly regular. The judgment of the Court was not obtained under Rules of Court, Order XL., rule 1, but under Order XL., rule 11, which enables any party at any stage to apply to the Court for "such order as he may upon any admissions of fact in the pleadings be entitled to, without waiting for the determination of any other question between the parties," and "any such application may be made by motion so soon as the right of the party applying to the relief claimed has appeared from the pleadings." The admissions here by the Defendant, a sole trustee and executor, were clear, and the Plaintiffs were entitled to have the order which was asked for made upon motion on a motion day.

[They referred to the cases of *Parsons* v. *Harris* (1), *Bennett* v. *Moore* (2), *Lendram* v. *Rooke*, there cited, and *Gilbert* v. *Smith* (3).]

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*W. Pearson*, in reply:—

There is nothing in any of the cases which have been cited which amounts to anything like a judgment, and here a judgment has been delivered, and not a mere order made, such as appears to be contemplated by rule 11. Supposing it is an order under rule 11, then it is such an order as the Plaintiffs are not entitled to upon the admissions of fact in the pleadings. The Court has full jurisdiction to make a proper order upon this motion.

Judgment.

HALL, V.C.:—

I am of opinion that upon the true construction of Rules of Court, Order XL., rule 11, an order in the nature of a decree such as has been made in this case is perfectly regular. In *Gilbert* v. *Smith* Lord Justice *James*, referring to the prior case of *Bennett* v. *Moore*, a suit instituted under the old practice, and therefore before any particular construction could be placed upon this rule, said that upon a motion under this rule founded on admissions of fact in the answer, the order made amounted to a full decree for execution of the trusts of the settlement, with inquiries as to parties and accounts, with an order that a defaulting trustee should pay money into Court, and an adjournment of the further hearing of the cause, without requiring any further prior hearing than the motion; and Lord Justice *Mellish*, after referring to an admission in the pleadings, said: "It must, however, be such an admission of facts as would shew that the Plaintiff is clearly entitled to the order asked for, whether it be in the nature of a decree or a judgment, or anything else." I should be putting a narrow construction upon rule 11 if I held that the order made was, so far as the competency of the Court is concerned, not within its jurisdiction. Therefore it appears to me that although the words "decree or decretal order" were used in the notice of motion served upon the Defendant, the notice was regular, and one upon which the order could be made. I do not think that in asking an order from the

(1) 6 Ch. D. 694. (2) 1 Ch. D. 692.
(3) 2 Ch. D. 686.

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Court a party is bound to state under which rule or order he proposes to move, and it frequently happens that parties move under a particular rule, and then, when they find it is a wrong one, turn to another, and an order is made. This being so, the Defendant was wrong in holding back and in treating this notice as an improper one, and he ought in fairness to have intimated to his opponent that an order obtained upon such a motion could not be maintained. The Defendant was wrong, and the Plaintiffs were right in moving the Court on their notice of motion.

Solicitors: *Bell, Brodrick, & Gray*, agents for *Bleaymire & Shepherd, Penrith; Edmund Warriner*, agent for *Thomson & Wilson, Kendal.*

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V.-C. H. 1878 Dec. 21.

## *In re* OWEN.

*Tenant for Life of Freeholds—Reversionary Interest—Production of Cestui que Vie by Party in Possession—6 Anne, c. 18.*

Where an application is made under the statute 6 Anne, c. 18, s. 1, to the party in possession of an estate for the production of a *cestui que vie* to the person entitled to the estate in remainder, and the party in possession does not respond to the application, the applicant is entitled to an order for production.

Statement.

MARY ANCHORS, who died in February, 1835, by her will made in 1834 devised a freehold estate, situate in *Denbighshire*, to trustees to the use of her grandson *Edward Owen* for life, with remainders to his sons in tail, and to his daughters as tenants in common in tail.

*Edward Owen* had two children (sons); one died in infancy, and the other in 1872, unmarried, intestate, and without having barred his estate tail.

In 1838 *Edward Owen* sold his life interest to *John Hayward*, and he shortly afterwards sold or mortgaged it to Miss *Downes*, who upon the bankruptcy of *Hayward* entered into, and was now in possession.

In 1853 *Edward Owen* was convicted of forgery, and was transported to *Van Dieman's Land.* The devisees in remainder in tail

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executed deeds for the purpose of barring the entail, and sold their interests in the estate to a purchaser. This was an application by the purchaser of the remainder that the purchaser of the life interest do produce the *cestui que vie*. The application being made under the statute 6 Anne, c. 18, s. 1. The applicant, who had caused inquiries to be made for *Edward Owen* in *Hobart Town, Tasmania*, had failed in tracing him after the year 1855, and believing that he was dead, he, on the 6th of December, 1878, gave notice to the solicitors of the party now in possession of the estate, in pursuance of the above statute, to produce the *cestui que vie* within fourteen days from the date of the notice, but they had failed to do so. The solicitors accepted service of the notice to produce on behalf of their client, and informed the purchaser that their client held a policy of life assurance upon the life of *Edward Owen;* that they had had no information of him since the year 1855; and that they had applied to the office in which the policy was effected for payment of the sum assured thereby.

Statement.

*Cozens-Hardy*, in moving for an order that the party in possession do produce *Edward Owen*, pointed out that the affidavit of the purchaser of the estate did not contain any express statement that he had cause to believe that *Edward Owen's* death was concealed by Miss *Downes*, and submitted whether the affidavit was sufficient without an express statement to that effect. He referred to the cases of *Ex parte St. Aubyn* (1), *Ex parte Grant* (2), *In re Lingen* (3), *In re Clossey* (4), *In re Dennis* (5), and *Re St. John's Hospital, Cirencester*, before Vice-Chancellor Sir *J. Stuart* on the 11th of January, 1868 (6).

Argument.

HALL, V.C.:—

Judgment.

Having regard to the way in which the statute 6 Anne, c. 18, s. 1, has been construed, and to the cases which have been referred to, and also to the orders which have been made by the Court under the statute, I hold that where it appears by an applicant's

(1) 2 Cox, 373.
(2) 6 Ves. 512.
(3) 12 Sim. 104.
(4) 2 Sm. & Giff. 46.
(5) 7 Jur. (N.S.) 230.
(6) Reg. Lib. 1868, B. 133; and see 16 W. R. 556.

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affidavit (as it does here) that an application has been made to the person being and claiming title to be in possession in respect of the life estate by the person entitled to the estate in remainder for the production of the *cestui que vie*, and the person so in possession and applied to does not respond to the application, the applicant is, under the statute, entitled to an order for production under it. I therefore make an order for production in the common form.

Solicitors: *Dean & Taylor*, agents for *Minshalls & Parry-Jones, Oswestry.*

## *Ex parte* LITHGOW. *In re* FENTON.

C. J. B.
1878
July 29.

*Execution against Trader—Liquidation Petition—Injunction to restrain Sale—Debt above £50—Possession Money—Bankruptcy Act*, 1869 (32 & 33 *Vict.* c. 71), s. 87.

In determining whether the amount for which an execution is to be levied exceeds £50, possession money may be taken into account even after an injunction has been granted restraining the sheriff from selling the goods.

Statement.

THIS was an appeal from a decision of the Judge of the *Halifax* County Court.

On the 5th of April, 1878, *Richard Fenton*, a boot and shoe dealer at *Preston, Lancashire*, filed a liquidation petition in the *Preston* County Court. On the 24th of April the creditors at their first meeting resolved on a liquidation by arrangement, appointed *Frederick Foster* trustee, and resolved that the proceedings should be transferred to the *Halifax* County Court. On the 2nd of April the Sheriff of *Lancashire* had seized goods of the debtor under a *fi. fa.* issued upon a judgment recovered in an action by *Thomas Lithgow* against the debtor. The writ was indorsed to "levy £43 3*s.* 9*d.* and £1 10*s.* 8*d.* for costs of execution, and also interest on £43 3*s.* 9*d.* at 4 per cent. per annum from the 2nd of April, 1878, until payment, besides sheriff's poundage, officer's fees, costs of levying, and all other legal incidental expenses." On the 8th of April an order was made by the *Preston* County Court restraining the sheriff from selling until the 15th of April. This injunction was afterwards continued until the 6th of May. On the 6th of May the Registrar of the *Preston* Court refused to continue it any longer, on the ground that, the proceedings having been transferred to *Halifax*, he had no further jurisdiction in the matter. On the 7th of May the sheriff, who had remained in possession of the goods, removed them, and on the 16th of May he sold them by auction. The trustee claimed the proceeds of the sale, less expenses, on the ground that the

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Statement.

levy was for a sum exceeding £50. The sheriff claimed to retain the following sums:—

| | £ | s. | d. |
|---|---|---|---|
| Debt | 43 | 3 | 9 |
| Costs of execution | 1 | 10 | 8 |
| Poundage | 2 | 4 | 0 |
| Taking possession | 1 | 1 | 0 |
| Mileage | 0 | 12 | 6 |
| Possession from the 2nd of April to the 8th of April (seven days at 3*s.* 6*d.*) | 1 | 4 | 6 |
| May 6th, possession | 0 | 7 | 0 |
| Interest | 0 | 3 | 3 |
| Total | £50 | 6 | 8 |

Application was made to the Court, and the Judge ordered the sheriff to pay over to the trustee the proceeds of the sale, after deducting the sheriff's costs in relation to the execution and of the order. The execution creditor appealed.

Argument.

*E. C. Willis*, for the Appellant:—

After the Court has once interfered by injunction the sheriff is not entitled to charge possession money, so as to bring the amount to be levied above £50, and thus change the rights of the parties. If this can be done, it would be easy in most cases to continue an injunction for a long period, and thus to bring a debt of less than £50 above that sum by means of a large amount of possession money. The rights of the parties must be fixed at the time when the injunction is granted; they cannot be affected by anything which happens afterwards.

He referred to *Howes* v. *Young* (1); *Ex parte Liverpool Loan Company* (2); *Ex parte Sims* (3).

*Finlay Knight*, for the trustee, was not heard.

Judgment.

BACON, C.J.:—

When the sheriff has seized under the writ he is by law entitled to remain in possession until the sum for which he is to levy has been satisfied. He may be restrained from selling the goods, but

(1) 1 Ex. D. 146. (2) Law Rep. 7 Ch. 732.
(3) 4 Ch. D. 521; 5 Ch. D. 375.

that does not interfere with his right to retain possession until the amount for which he is to levy is satisfied. In the present case, when the levy was satisfied by means of the sale, the sum which the sheriff was entitled to retain was more than £50. This question has been several times before me and before the Court of Appeal, and in my opinion there can be no doubt about it. The sum to be satisfied is the debt and costs, including possession money. There is no ground whatever for the appeal, and I dismiss it with costs (1).

Solicitors for Appellant: *Pritchard, Englefield, & Co.*, agents for *J. Sampson, Manchester.*

Solicitors for Trustee: *Learoyd, Learoyd, & Peace,* agents for *J. W. Longbottom, Halifax.*

(1) The execution creditor presented an appeal from this decision, but in November, 1878, he withdrew the appeal.

C. A.
1878
M. R.
*March* 30.
C. A.
*Dec.* 20.

## CURTEIS *v.* WORMALD.

[1875 C. 107.]

*Conversion—Money directed to be laid out in Land—Intestacy—Real or Personal Estate.*

Where personal estate is bequeathed upon trusts for conversion into land to be held on trusts which ultimately fail, land purchased before the failure of the trusts goes to the next of kin as real estate.

*Reynolds* v. *Godlee* (1) overruled.

Statement. THE testator, *George Gent*, died in 1818, having by his will devised his real estates in settlement, limiting life estates to several persons, with remainders to their sons successively in tail male, and the ultimate reversion in fee to a relation who died in the testator's lifetime. By a codicil he, on the death of the devisee of the reversion, substituted another devisee; but by a seventh codicil revoked this substituted devise, and by an eleventh codicil directed that "the remainder of the fee simple of all my landed estates shall go in such way as the law may direct." He directed his trustees, whom he also appointed his executors, to lay out his residuary personal estate in the purchase of freehold and copyhold estates to be settled to the same uses.

All the tenants for life survived the testator and died without issue, and on the death of the survivor of them in 1870, all the dispositions of the real estate came to an end.

The next of kin of the testator at his death were *Edward Walker* and *Benjamin Walker*. *Edward Walker* died in 1820, and *Benjamin Walker* in 1827. The testator's debts and funeral expenses and legacies were all paid, and at various times, beginning in 1821 and ending in 1870, considerable sums forming part of the testator's residuary estate were invested in the purchase of freehold and copyhold estates. The freeholds so purchased were for the most part, if not entirely, conveyed to the uses declared by the will and codicils concerning the devised estates. The copyholds were surrendered to the trustees on corresponding trusts. The last of these purchases was completed after the death of the

(1) Joh. 536, 582.

C. A. 1878 CURTEIS v. WORMALD.

last tenant for life, but the contract had been entered into before his death.

*Edward Walker* devised his real estates to his son *George Walker* absolutely. *Benjamin Walker* died intestate as to his residuary real estate, leaving *George Walker* his heir-at-law. *George Walker* devised all his real estate to the Plaintiff *E. Walker* and the Defendant *Robert Walker* upon trusts. The Plaintiff *E. Walker* and the Defendant *Robert Walker* were thus the real representatives both of *Edward Walker* and of *Benjamin Walker*, and they were also the personal representatives of *Edward Walker*. The personal representative of *Benjamin Walker* was *Jeremiah Curteis*, the other Plaintiff. The Plaintiff *E. Walker* was the heir-at-law of both *Edward Walker* and *Benjamin Walker*.

Statement.

By an order made on the 13th of November, 1876, it was declared that, according to the true construction of the will and codicils of the testator, and in the events which had happened, he had died intestate as to the corpus of his residuary personal estate, and that his next of kin, according to the Statutes of Distribution, living at his death, were entitled to such corpus.

A summons was now taken out by the Plaintiff *E. Walker*, asking for a declaration that the corpus of the residuary personal estate, to which the next of kin were declared by the order of the 13th of November, 1876, to be entitled, devolved as real estate. The summons was heard before the Master of the Rolls on the 3rd of March, 1878.

*Davey*, Q.C., and *Romer*, for the Plaintiff *E. Walker*:—

Argument.

We submit that the testator's next of kin took the undisposed of interest in the purchased real estates in the character of real estate, and, accordingly, that on the deaths of the next of kin it became transmissible as real estate, and not as personal estate. It is clear that the effect of this direction to lay out personal estate in the purchase of land was to effect a conversion into real estate; and it is also clear that the undisposed of interest in the lands purchased resulted to the testator's next of kin, and not to the heir: *Cogan* v. *Stephens* (1); for a conversion under a will is not an absolute conversion, but only a conversion so far as is necessary for the

(1) 5 L. J. (Ch.) 17.

C. A. 1878 — CURTEIS v. WORMALD. — Argument.

purposes of the will: *Wright* v. *Wright* (1). But the question now is, whether the next of kin take this undisposed of interest as personal estate or as real estate; and upon that we submit that a conversion, being for the purposes of the will only, does not affect the rights of persons who take independently of the will. The only authority against that view is *Reynolds* v. *Godlee* (2), but we submit that that decision is opposed to all principle, and should not be followed.

[JESSEL, M.R.:—That is a very unsatisfactory decision, and I cannot follow it.]

*Chitty*, Q.C., and *Murray*, for the legal personal representatives of *Benjamin Walker*, relied on *Reynolds* v. *Godlee*, and submitted that inasmuch as that was a decision nearly twenty years old it ought not now to be overruled.

*Bagshawe*, Q.C., and *Snape*, for the Defendant *Robert Walker*.

Judgment, M.R.

JESSEL, M.R.:—

The point which I have to consider and to decide is this: A testator directed his trustees—for although the same persons may have been appointed executors they are for this purpose trustees, and trustees only—to lay out his residuary personal estate in the purchase of real estate, freeholds and copyholds, to be settled to certain uses, comprising a long series of limitations. The residue was ascertained, that is, the testator's debts and legacies and funeral and testamentary expenses were all paid, and then the residue was at different times laid out by the trustees, pursuant to the will, in the purchase of freehold and copyhold estates, which were conveyed so as to vest the legal estate in the trustees.

That being so, the limitations took effect to a certain extent, and then, by reason of failure of issue of the tenants for life, the ultimate limitations failed, and there became a trust for somebody. Now, for whom?

According to the doctrine of the Court of Equity, settled, if I may say so, by the well-known case of *Ackroyd* v. *Smithson* (3)—

(1) 16 Ves. 188. (2) Joh. 536, 582.

(3) 1 Bro. C. C. 503.

for it has always been the law of this Court since—this kind of conversion is a conversion for the purposes of the will, and does not affect the rights of the persons who take by law independent of the will. If, therefore, there is a trust to sell real estate for the purposes of the will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the persons entitled to the personal estate, that is, the persons who take under the Statutes of Distribution as next of kin. Their right to the residue of the personal estate is a statutory right independent of the will.

The result is that in the case I put there is a trust for the next of kin. How any one could imagine it was a trust for anybody else it is difficult to understand; and had I not been referred to the judgment of a very eminent Judge on this subject I should have said it was impossible to understand it.

There certainly is authority for saying—a single authority, and an authority standing alone—that the ultimate trust is not for the next of kin, but for the executors. Why? The executors have ceased to have anything whatever to do with the matter. They have paid over the legacy to the legatee, who happens to be a legatee-trustee, and who holds it by law, under the Statutes of Distribution, as trustee for the next of kin, and no one else. By what process of reasoning any other result can be arrived at I have been unable to discover. The decision to which I have referred is one which, to my mind, is utterly opposed to the whole law upon the subject.

Then the next question which arises is, how does the heir-at-law in the first case, or the next of kin in the second, take the undisposed of interest? The answer is, he takes it as he finds it. If the heir-at-law becomes entitled to it in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representative, and consequently his executor takes it as part of his personal estate.

On the other hand, if the next of kin, having become entitled

C. A. 1878 CURTEIS v. WORMALD. Judgment, M.R.

to a freehold estate, dies, there is no equity to change the freehold estate into anything else on his death: it will go to the devisee of real estate, or to his heir-at-law if he has not devised it, and will pass as real estate. As to that, there is no question, no doubt, no difficulty. No one has suggested any other principle, and even in the case cited—*Reynolds* v. *Godlee* (1)—it was admitted that that was the principle, and the only point of difference or distinction suggested was that which appears to me to be opposed to the whole law on this subject, namely, that there was an ultimate trust for the executors, and not for the next of kin.

As that does not seem to me to have any foundation, and as it appears to me to be opposed to both principle and authority, I do not consider myself bound to follow that decision, and I may say that I am very glad to find I can invoke the very same judgment of the very same Judge for the purpose of shewing that I am not bound to follow it; for, being referred to a decision of another Judge—the Master of the Rolls—given several years before, he said that that decision was not obligatory upon him; but that as he thought it consonant with sense and reason, and sound law, he chose to follow it. Unfortunately I do not entertain the same view as regards this authority, and therefore I am unable to follow it.

A declaration was accordingly made "that all the real estate bought or contracted to be bought before the death of the last tenant for life passed to *Edward Walker* and *Benjamin Walker*, the next of kin of the said testator, as real estate in equal moieties, and that *George Walker* became entitled to one of such moieties as the devisee of the said *Edward Walker*, and to the other moiety as the heir-at-law of the said *Benjamin Walker* at his (*Benjamin Walker's*) death, and that both of such moieties passed to the devisees of the real estates under the will of the said *George Walker*."

C. A. The legal personal representative of *Benjamin Walker* appealed. The appeal was heard on the 20th of December.

(1) Joh. 536, 582.

*Chitty*, Q.C., *Ince*, Q.C., and *G. Murray*, for the Appellant:—

Until the decision of Lord *Cottenham* in *Cogan* v. *Stephens* (1), it was not settled that the next of kin were entitled to an undisposed of interest in real estate directed by a will to be purchased with personal estate of the testator. That is not now in dispute, but the question remains whether the next of kin take it as personalty or in its actual state. In *Reynolds* v. *Godlee* (2), which is the only direct authority on the point, it was decided that the undisposed of interest reverts to the executors, who must apply it as personal estate, and that the analogy of an undisposed of interest in real estate directed to be sold does not apply, but the property must continue to be treated as personalty. *Cogan* v. *Stephens* to some extent supports the same view.

*Davey*, Q.C., and *Romer*, for the Plaintiff *Edward Walker*, and *Bagshawe*, Q.C., and *Snape*, for the Defendant *Robert Walker*, were not called upon.



JAMES, L.J.:—

I have no doubt as to the proper decision to be arrived at in this case. With all deference to the judgment of Lord *Hatherley*, it is impossible, I think, to arrive at any other conclusion than that at which the Master of the Rolls has arrived. It was settled by *Cogan* v. *Stephens* that what was the right rule as between the real and personal estate where land was directed to be sold, was also the right rule as between the two estates in the case where money was directed to be laid out in the purchase of land, that is to say, if the purpose for which that land was required failed, the undisposed of interest went back to the persons entitled to the personal estate. It has been urged that this means that it goes back to the executors to be dealt with as personal estate. But where there is no trust remaining to be performed, and the executors have entirely discharged themselves from every executorial duty, it is absurd to say that the undisposed of interest in the personal estate is to go back to them upon trust for the persons

(1) 5 L. J. (Ch.) 17; *Lewin* on Trusts, 3rd. Ed. App. vii.
(2) Joh. 536.

C. A. 1878

CURTEIS v. WORMALD.

Judgment, C. A. James, L.J.

entitled to the personal estate; it goes directly to the persons beneficially entitled, that is to say, to the next of kin, just as the undisposed of proceeds of the sale of real estate go to the heir-at-law. And therefore the same principle applies in both cases, which is this, that where you trace property into a man there is no equity between his different classes of representatives as to altering the position in which that property is. If it is money arising from the sale of land it remains money, that is to say, the heir-at-law of the person who has become beneficially entitled to it as heir-at-law has no right to have it reconverted into land. If it is land purchased under a direction to invest in land, the persons interested in the personal estate of the persons who have become entitled to it as next of kin have no right to have it reconverted into money. This property came to the next of kin in the shape of real estate, and their personal representatives have no equity to have it converted, but it must go to the heirs or devisees of the next of kin according as they died intestate or testate. The decision of the Master of the Rolls must be affirmed.

Baggallay, L.J. BAGGALLAY, L.J.:—

I entirely assent, and for the same reasons.

Thesiger, L.J. THESIGER, L.J.:—

I am of the same opinion.

Solicitors: *Ewbank & Partington; G. L. P. Eyre & Co.*

## *Ex parte* JARVIS. *In re* SPANTON.

C. A. 1878
C. J. B. *Aug.* 3.
C. A. 1879 *Jan.* 16.

*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 28—*Annulling Adjudication—Subsequent Discovery of concealed Property of Bankrupt — Discharge of Annulling Order—Rights of Creditors.*

One of the creditors of a bankrupt held two bills of sale of his chattels. Objections had been raised by the trustee to the validity and extent of the security, though no steps had been taken to set it aside. Ulimately, the mortgagee offered to pay £620 to the trustee. A meeting of the creditors was held, under sect. 28 of the *Bankruptcy Act*, 1869, when it was resolved to accept the mortgagee's offer; that the bankruptcy should be thereupon annulled; and that the mortgagee should release his claim on the bankrupt's estate, and the bills of sale should not be disputed by the trustee. The resolutions were approved by the Court, and, upon the trustee certifying that the terms of them had been completed to his satisfaction, an order was made annulling the bankruptcy. The £620 was divided among the creditors other than the mortgagee. The mortgagee realized his security, but did not obtain enough to pay his debt in full. Six years afterwards it was discovered that the bankrupt had concealed a reversionary interest to which he was entitled at the date of his adjudication, and an order was obtained discharging the annulling order, and directing that the bankruptcy should proceed as if that order had not been made. The trustee then received the reversionary interest, which had fallen into possession :—

*Held* (reversing the decision of *Bacon*, C.J.), that the mortgagee, equally with the other creditors, was remitted to his original rights, and was entitled to prove for the unpaid balance of his debt.

Statement.

On the 27th of September, 1870, *Alfred Spanton*, a farmer, was adjudicated a bankrupt in the *King's Lynn* County Court. His statement of affairs shewed that he had no property except certain chattels, farming stock, and crops which were, as he stated, comprised in two bills of sale which he had executed in favour of Sir *L. W. Jarvis* (then Mr. *L. W. Jarvis*), to secure a debt, there being then due upon the security £2111 11*s.* 3*d.* *Jarvis* was in possession of the property. Objections were raised to the validity of the bills of sale, one objection being that they did not include the crops then growing on the bankrupt's farm, but no proceedings were taken to impeach them. Ultimately Sir *L. Jarvis* made an offer to the trustee to pay over to him £620, the value of the growing crops. On the 25th of October, 1870, a meeting of the creditors was held, under the provisions of sect. 28 of the

C. A. 1879

*Ex parte* JARVIS. *In re* SPANTON.

Statement.

*Bankruptcy Act*, 1869, when the following resolutions were passed by the statutory majority:—

"That the offer of a payment forthwith by Mr. *L. W. Jarvis* of £620 to the trustee be accepted.

"That the bankruptcy be thereupon annulled.

"That Mr. *Jarvis* release his claim upon the bankrupt's estate, and the bills of sale be not disputed by the trustee."

These resolutions were signed by fourteen of the creditors, but not by Sir *L. Jarvis.*

On the 18th of November, 1870, the Court approved of the resolutions, and ordered that, on the completion of the terms therein contained to the satisfaction of the Registrar, who was acting as trustee, further application should be made to the Court to annul the adjudication. On the 19th of July, 1871, upon a report of the Registrar that the terms of the resolutions had been completed to his satisfaction, an order was made annulling the adjudication. The £620 was then divided among the creditors, other than Sir *L. Jarvis.* He realized his security, and received thereby the sum of £1702 3*s.* 10*d.*, leaving a balance of £409 13*s.* 5*d.* due to him.

In the year 1876 it was discovered that at the date of the bankruptcy the bankrupt was entitled to a reversionary interest under the will of his father. He had made no mention of this interest in his statement of affairs, and none of his creditors were aware of its existence until long after the bankruptcy had been annulled.

Upon this discovery being made, application was made to the Court to discharge the order annulling the bankruptcy, and on the 20th of December, 1877, an order was made discharging the orders of the 18th of November, 1870, and the 19th of July, 1871, and ordering that the bankruptcy should forthwith proceed in the same manner as if those orders had not been made. The Registrar, as trustee, received upwards of £700 in respect of the reversionary interest, which had fallen into possession, and Sir *L. Jarvis* then tendered a proof in respect of the balance of £409 13*s.* 5*d.*, which remained due to him. The Registrar rejected the proof, and his decision was affirmed by the Judge. Sir *L. Jarvis* appealed to the Chief Judge. The appeal was heard on the 3rd of August, 1878.

*Winslow*, Q.C., and *Bottomley Firth*, for the Appellant, referred to *Lyall* v. *Edwards* (1).

C. A. 1879 *Ex parte* JARVIS. *In re* SPANTON.

*Finlay Knight*, for the trustee, was not heard.

BACON, C.J.:—

Judgment, C. J. B.

There is no ground whatever for doing what Mr. *Winslow* asks. This is a very plain case. Sir *L. Jarvis* had securities which he had put in force, and then a question was raised as to £620, whether he was entitled to retain that sum, or whether it formed part of the bankrupt's estate. The parties came to an agreement; the trustee did not dispute the security, and Sir *L. Jarvis* did not dispute that he had £620 in his hands which belonged to the bankrupt's estate, and he paid it to the trustee. The parties agreed that he should retain his security, that he should pay that sum, and that there should be an end of the matter between them. What has that to do with any release? Sir *L. Jarvis*, for reasons which he thought sufficient, was content to keep what he had got, and to pay the £620. Why? In order that it might be distributed amongst the creditors, that it might be a part of the bankrupt's estate. He could not tell what the bankrupt's estate was; he could not tell by what accident it might be increased or diminished. He declined to have anything to do with it, and he paid the £620. There has been no mistake, and no release more extensive than was in the contemplation of the parties. What they contemplated was this, You, Sir *L. Jarvis*, shall keep what you have got, and shall pay us that £620 upon which you have no claim, and which is to go amongst the creditors. If that £620 becomes increased by whatsoever accident you can still make no claim to it. He can have no right of proof against the subsequently acquired property of the bankrupt. Nobody could tell by what accident the property might be increased. Sir *L. Jarvis* did not inquire, nor did he care to do so. He said, Let me keep the proceeds of the bills of sale, and you may do what you like with the rest of the bankrupt's estate, whatever it is.

From this decision Sir *L. Jarvis* appealed. The appeal was heard on the 16th of January, 1879. C. A.

(1) 6 H. & N. 337.

C A. 1879 *Ex parte* JARVIS. *In re* SPANTON. Argument.

*Winslow*, Q.C., and *Bottomley Firth*, for the Appellant:—

The Appellant has done nothing to abandon his right of proof. Even if he entirely released the bankrupt's estate, the release was founded upon a mistake as to the value of the estate, a mistake into which he and all the other creditors were led by the bankrupt's concealment. Under such circumstances a release would not be binding at law: *Lyall* v. *Edwards* (1). If the resolutions of the 25th of October are gone for one purpose they are gone altogether, and all the creditors, including the Appellant, are remitted to their original rights.

*Finlay Knight*, for the principal creditor:—

The Appellant's bargain was to release the estate, and the consideration which he received was that his bills of sale were not to be disputed. That agreement was distinct from the annulling of the adjudication, and the subsequent order, which discharged the order for annulling, did not affect the other part of the resolutions.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

We are all clearly of opinion that the resolutions of the 25th of October are gone. The order which discharged the annulling order has destroyed those resolutions altogether, and every one of the creditors is remitted to his original position. Sir *L. Jarvis* was deprived of his rights against the bankrupt's estate, and he is now remitted to them again. Some property has now come in for the benefit of the creditors who in terms released the bankrupt. Sir *L. Jarvis* did nothing except upon the footing of the mistake into which he fell in common with the other creditors, and he is now remitted to his original rights equally with them. His proof must be admitted.

Baggallay and Bramwell, L.JJ.

BAGGALLAY and BRAMWELL, L.JJ., concurred.

Solicitors for Appellant: *Burton, Yeates, & Hart*, agents for *E. M. Beloe, Lynn.*

Solicitor for Respondent: *T. M. Wilkin.*

(1) 6 H. & N. 337.

## *Ex parte* CAHEN. *In re* CAHEN.

C. A. 1879 Jan. 23.

*Liquidation Petition—Lunatic—Next Friend—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 65, 125—*Bankruptcy Rules*, 1870, *rr.* 7, 252—*Bankruptcy Forms*, 1870, *No.* 106.

A liquidation petition cannot be signed by a next friend on behalf of a lunatic not so found by inquisition.

*Semble*, that, in the case of a lunatic so found by inquisition, the Court of Lunacy might have jurisdiction to direct that a liquidation petition should be signed on his behalf.

Statement.

*H. J. CAHEN* and *C. Cahen* were partners in trade. On the 10th of January, 1879, *C. Cahen*, having become insane, was by the direction of his medical attendant placed in a lunatic asylum. Shortly afterwards *H. J. Cahen* filed a separate liquidation petition. A joint petition on behalf of the partners was prepared, and was signed by *H. J. Cahen* on behalf of himself, and also as next friend on behalf of the lunatic. *C. Cahen* had not been found a lunatic by inquisition. The Registrar refused to receive the joint petition, and his decision was affirmed by Mr. Registrar *Brougham*, acting as Chief Judge. There was evidence that a judgment for £200 had been recovered against the firm, and that the judgment creditor was in a position to issue execution against the joint assets.

Argument.

*T. N. Hilbery*, for *H. J. Cahen*, now applied *ex parte* for a direction to the Registrar to file the joint petition:—

Unless a joint petition is filed, or a joint act of bankruptcy committed in some other way, the joint assets cannot be protected from executions in respect of joint debts. They may be all swept away by a few creditors, who will thus obtain payment in full. This will be an injury to the other joint creditors, and also to both the partners, who will not be able to obtain a discharge from the joint debts, even if the joint assets might be sufficient to pay 10*s.* in the pound.

[BRAMWELL, L.J.:—An execution above £50 levied by seizure and sale would be an act of bankruptcy, of which the other creditors might take advantage: *Bankruptcy Act*, 1869, ss. 6, 87.]

C. A. 1879 *Ex parte* CAHEN. *In re* CAHEN. Argument.

There might be no creditors whose debts became due before the expiration of fourteen days from the sale. A lunatic not so found by inquisition could sue by a next friend in the Court of Chancery for a dissolution of partnership, and sect. 65 gives the Court of Bankruptcy all the powers and jurisdiction of the Court of Chancery.

[JAMES, L.J.:—A lunatic cannot by himself or by a next friend commit a voluntary act of bankruptcy. In a liquidation petition the debtor has to state that he is unable to pay his debts.]

Form No. 106 of the Bankruptcy Rules, 1870, contains such a statement, but the use of that form is required only by rule 252. The Act does not require it. And rule 7 shews that the prescribed forms may be deviated from in a proper case. In *Anon.* (1) it was held that lunacy was no defence to a commission of bankruptcy; and in *Ex parte May* (2), where a bankrupt was lunatic, though not so found by inquisition, another person on his behalf was allowed to make the affidavit required by 6 Geo. 4, c. 16, s. 122, to be made by the bankrupt, that his certificate and the consent of his creditors to his discharge had been obtained without fraud.

Judgment. James, L.J.

JAMES, L.J.:—

It is very desirable that what is asked for should be done, but the Legislature has made no provision for such a case. Without some statutory provision it seems to me utterly impossible that any man should be able to say for a lunatic that he is unable to pay his debts, and that he desires to have his affairs liquidated. Possibly, if he had been found a lunatic by inquisition, the Court of Lunacy might think that this course would be for his interest, and might be able to act on his behalf. But the Court of Bankruptcy has no such jurisdiction, and I think the Registrar was quite right in refusing the application.

Baggallay and Bramwell, L.JJ.

BAGGALLAY and BRAMWELL, L.JJ., concurred.

Solicitors: *F. W. & H. Hilbery.*

(1) 13 Ves. 590. (2) 2 M. D. & D. 381.

## THOMAS *v.* ATHERTON.

C. A.
1877
V.-C. B.
*July* 11.
C. A.
1878
*Nov.* 15, 16, 19, 22; *Dec.* 2.

[1871 T. 115.]

*Partnership—Loss arising from Negligence of Partner—Arbitration—Assent of Partners to Submission.*

*T.*, the managing partner of a colliery, received notice from *L.*, an adjoining owner, that the workings were being carried on beyond the boundary. *T.* insisted that he was entitled to the disputed ground, and carried on his workings. An action was then commenced against him by *L.*, and was referred to arbitration. *T.*'s partners were not informed of these proceedings till after the reference to arbitration had been agreed to. They did not object to it, but treated it as a proceeding in which they were interested, and were present before the arbitrator. The arbitrator awarded that there had been a trespass, and assessed the damages at £6000. The partners refusing to contribute, *T.* filed his bill to compel them to do so. The Defendants set up the case that *T.* had wilfully and knowingly worked beyond the boundary. *Bacon*, V.C., considered that he had not worked beyond his boundary at all, but held him not entitled to contribution, on the ground that he had no authority to refer the dispute to arbitration without the assent of his partners, and that their subsequent assent was given in ignorance of material facts, and was not a sufficient ratification.

On appeal, the Court was of opinion that the arbitration had been assented to, so as to make the arbitrator's award binding on the co-partners as to the fact of trespass and the *quantum* of damages, but, being of opinion that the Plaintiff, although he had not knowingly trespassed, had worked beyond the limits of the partnership colliery without proper inquiry as to the limits, and had acted with gross negligence and recklessness in continuing his workings after notice, and without consulting his partners, when it was evident that his right to work in the disputed area was extremely doubtful, and the profits to be expected from so doing very small:—

*Held*, that the decision that the other partners were not liable to contribute ought to be affirmed:

*Held*, also, that as no additional costs had been occasioned by the allegation that the Plaintiff had wilfully and knowingly trespassed, the Plaintiff could not be relieved from any part of the costs on the ground of the failure of that allegation.

Statement.

THIS was a suit for contribution by the managing partner of certain coal workings in the *Forest of Dean* against his co-partners in respect of damages awarded by reason of a trespass on the coal property of an adjoining proprietor.

Adjoining the co-partnership workings was a colliery called the *Hopewell Colliery*, and adjoining that was a colliery called the

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*Thatch* or *Independent Colliery* belonging to Mrs. *Loxley*. These collieries were formed under what are called "gales" in the *Forest of Dean*. The coal mines in the *Forest of Dean* belong to the Crown, subject to customary rights of remote antiquity in certain persons called "free miners," to take, and hold, and work portions of the coal-field. Two of those portions were the *Hopewell* and *Thatch* collieries, which were and had been in existence at the time of and long previously to the passing of the *Dean Forest Mines Act*, 1838 (1 & 2 Vict. c. 43). That Act was passed for, amongst other purposes, the objects mentioned in the 24th and 26th sections of the Act, and which may be briefly stated thus: The Commissioners were to ascertain who the persons were who were entitled to any existing gales, or any estate or interest therein, and were to cause a plan or plans to be made upon which the situation of the gales was to be delineated, and were to make a schedule or description of the gales to accompany the plans. All persons interested, or claiming to be interested, in any gale were to send in claims in manner therein mentioned, and in default of so doing were to be barred from all right to any such gale, and all benefit or interest therein.

By their award, dated the 8th of March, 1841, the Commissioners awarded the *Thatch* or *Independent Colliery* to certain persons under whom *Lucy Loxley* derived title thereto. And they awarded the *Hopewell Colliery* to certain persons under whom *Peter Teague* and others derived title. *Teague* and some, but not all, of his co-owners formed a working partnership under the name of *Peter Teague & Co.* The Plaintiff *Thomas* was a co-owner to the extent of one-twelfth, but was not a member of the firm of *Peter Teague & Co.* *Peter Teague & Co.* worked that colliery, and other coal properties similarly situated, under an understanding with their co-owners, as follows, viz., the coal was considered as worth so much royalty, and *Peter Teague & Co.* divided the royalties on the workings between themselves and their co-owners. *Peter Teague & Co.*, being then owners of the greater part of the colliery, and permitted on that understanding to work the shares of the others, in the year 1859 entered into an agreement with the Plaintiff's firm of *Trotter Thomas & Co.*, as follows:—

"Memorandum of an agreement entered into the 22nd day of

February, 1859, between *Trotter Thomas & Co.* of the one part, and *Peter Teague & Co.* of the other part. *Trotter Thomas & Co.* agree to take and work the unworked coal in *Hopewell*, in *Wimberry Colliery*, on the east and west of the ridge in *Hopewell Bottom* in the north-eastern direction, and cut on the eastern side of the ridge a new deep level according to the terms of the award, working the coal on each side of the ridge in a workmanlike manner, rendering and paying to *Peter Teague & Co.*, the proprietors of the colliery, sixpence per ton for all large coal sold and threepence per ton for all small or lime coal sold. They also agree to pay all poor-rates and the Crown royalty of twopence per ton.

"*Peter Teague & Co.* hereby agree to let to the said *Trotter Thomas & Co.* the above award of coal upon the terms above mentioned, and, in addition, to allow the use of the plates now laid in the roads of the level now in work, excepting 100 yards which are required for the *Bush Pit.*

"Should *Trotter Thomas & Co.* wish to give up the said colliery at any time, they shall be at liberty to do so by giving three months' notice to *Peter Teague & Co.*, and leaving the then workings open and free to *Peter Teague & Co.* without demanding any compensation for opening the levels or pits. All castings, &c., laid down by the said *Trotter Thomas & Co.* may be reserved by them if not taken to at a valuation at the close of the term by *Peter Teague & Co.*"

Under that agreement *Trotter Thomas & Co.* worked the *Hopewell Colliery*, and in so doing worked into what Mrs. *Loxley* claimed as part of the *Thatch* or *Independent Colliery.* The Plaintiff *Thomas* was the managing partner, and had the sole superintendence of its operations.

The plans annexed to the award of the Commissioners shewed this disputed spot as part of the *Thatch Colliery.* It was contended on the part of the Plaintiff that the inaccuracy of the plans was notorious in the district, and that the letterpress which accompanied them explained them, and shewed that the spot in question lay within the limits of the *Hopewell Colliery.* Vice-Chancellor *Bacon* considered that this was established, but the Court of Appeal did not agree with his Lordship's conclusion.

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Long prior to this an agreement dated the 27th of October, 1802, had been entered into between *James Teague* the elder and several other persons, who were at that time co-owners with him of the *Thatch Colliery*, which was in substance an agreement for a partition of the colliery. Under this agreement a certain part of the colliery was to belong to *James Teague* the elder in severalty, but, as it appeared, under another contemporaneous agreement *Isaiah Birt* was to have one third share of it. Both *James Teague* the elder and *Isaiah Birt* were dead at the time when the Commissioners under the Act investigated the titles to the mines, and no claim on behalf of the persons claiming under their wills was carried in, and the whole of the *Thatch Colliery* was awarded to the persons who, under the agreement of 1802, were entitled to the other parts thereof. In 1864, the Plaintiff having carried the workings on behalf of the partnership into the disputed area, Mrs. *Loxley* gave a formal notice to the Plaintiff and *Peter Teague* that they were trespassing, and required an account of coal gotten, and called on them to desist from encroaching on the *Thatch Colliery*. The Plaintiff and *Teague* thereupon consulted counsel, and were advised that possibly they might be able to establish that the persons under whom Mrs. *Loxley* derived title were by the agreement of 1802 made trustees for *James Teague* the elder and *Isaiah Birt* of that part of the colliery which was agreed to be given up to them, and which was stated to include the area now in dispute. The Plaintiff and *Peter Teague* were the persons principally interested in such right, if any, as could be established in this way, and a bill was prepared on their behalf to enforce this equitable title, but no proceedings were actually taken. The Plaintiff returned to the notice an answer claiming title to the disputed mines under the agreement of 1802, and alleging that possession had ever since been had according to this agreement. Upon the receipt of the notice *Teague* and *Thomas* also served on Mrs. *Loxley* a counter-notice by which they claimed to be "owners" of the coal in the disputed area, and warned her not to trespass upon it.

In November, 1869, Mrs. *Loxley* commenced an action against the Plaintiff and *Peter Teague* for trespass on her colliery. On the 12th of August, 1870, by an agreement in writing between Mrs. *Loxley* of the one part and the Plaintiff and *Teague* of the

other part, the matters in difference were referred to arbitration. The agreement recited that Mrs. *Loxley* claimed to be the owner in fee of the *Thatch Pit Colliery*, and that "the said *John Trotter Thomas* and *Peter Teague* for themselves and others claim to have been and to be entitled at law or in equity to certain parts of the said colliery, and to work or get the coal which may have been or may be found or got from within a certain area or certain limits thereof. And whereas the said *L. Loxley* alleges that large quantities of coal have been wrongfully worked and gotten by the said *J. T. Thomas* and *P. Teague* from within the area or limits of the said colliery so as aforesaid claimed by them, and in parts of the said colliery beyond such limits or area, and they also allege that large quantities of coal have been wrongfully worked or gotten by the said *L. Loxley* from within the said area or limits, and disputes and differences have arisen between the said *L. Loxley* and the said *J. T. Thomas* and *P. Teague* in respect thereof, and in respect of the right, title, and claim of either party to have worked and gotten and to work and get the coal lying within the said area and limits, the said *L. Loxley* contending that the whole of the coal within such limits belongs absolutely to her, and the said *J. T. Thomas* and *P. Teague* claiming to have been and to be entitled on behalf of themselves and others, either at law or in equity, to work and get the coal within the said area and limits." The agreement then recited the action and the contemplated suit in equity. The other partners in the firm of *Trotter Thomas & Co.* were not informed of the action or of the reference to arbitration until the 11th of December, 1870, when the Plaintiff wrote a letter to *Nathan Atherton*, one of the partners:—"There is an action coming off in a matter between Mrs. *Loxley* of the *Independent Collery* and the *Hopewell Colliery Company*. We are only implicated as tenants, and the whole concern is not worth the lawyers' expenses. Of course we are right, as all expenses we may be put to will come out of the royalty. I shall have to run up to *London* on Monday evening the 2nd of January, and must return on Tuesday after giving my evidence. I have kept the royalty in hand by permission of Messrs. *Teague & Co.* to secure our expenses. I have now about £40 in hand." *Atherton* communicated the fact to the *Crowdys*, the other partners. The pro-

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ceedings under the reference commenced on the 1st of February, 1871, and *Atherton* and a solicitor on behalf of the *Crowdys* attended to watch, and made no objection to the reference. The arbitrator, on the 25th of July, 1871, by his award determined the boundary line between the two collieries, and awarded that *P. Teague* and the Plaintiff should pay Mrs. *Loxley* £6000 as damages for the coal gotten beyond the boundary line.

The Plaintiff's partners in the firm of *Trotter Thomas & Co.* denying their liability to contribute towards payment of this sum, the Plaintiff in November, 1871, filed his bill in this suit against them, praying that the partnership might be dissolved and wound up, and that it might be declared that the £6000 and the share of the costs of Mrs. *Loxley* awarded to be paid by the Plaintiff and *Teague* to Mrs. *Loxley*, and the Plaintiff's costs of the action, reference, and award, or so much thereof respectively as was or might be payable by the Plaintiff, constituted a debt of the partnership, and that the partners might contribute rateably along with the Plaintiff.

Several of the Defendants by their answers raised the contention that the Plaintiff had knowingly and wilfully worked beyond the boundaries of the colliery.

The action was tried before Vice-Chancellor *Bacon* on the 11th of July, 1878.

*Benjamin*, Q.C., and *J. G. Wood*, for the Plaintiff.

*Kay*, Q.C., Sir *H. Jackson*, Q.C., and *Stirling*, for the other partners; and

*Whitehorne*, for the representatives of a deceased partner.

Judgment, V.-C. B.

BACON, V.C.:—

The main point which I have to decide is whether under that award, which was made in July, 1871, the Defendants, who were the Plaintiff's partners in the trade carried on by them, are liable to contribute according to their proportionate interest in the partnership. It cannot, I think, be disputed that the authority of a partner to refer to arbitration cannot be exercised without the consent and knowledge of his partners. I agree, also, that there

may be such conduct on the part of the other partners as would imply or supply the deficiency of any express authority. What my attention has been particularly directed to is what took place between August, 1869, and the termination of the proceedings in July, 1871—viz., whether what took place in that interval, with the knowledge of this fact, does supply the acquiescence which would be necessary to complete the authority of *Thomas*, the Plaintiff, to enter into the arbitration. Referring to the evidence, it is not disputed that the agreement to refer was entered into by *Thomas* without any communication with his partners, without any explanation to them of the nature of the reference that he proposed to submit, and it was not until in his letter of the 11th of December, 1870, that he announced the fact of the arbitration having been agreed on to *Atherton*. It was upon that intimation, and there was no other explanation than that which was in that letter, that *Atherton* came to attend the arbitration. What took place before the arbitrator is left in some obscurity. The only witnesses, as I gather, examined before the arbitrator on behalf of the Plaintiff were the Plaintiff and his son, and I gather from the evidence also given in this case that Mr. *Huxham* was examined on behalf of Mrs. *Loxley*.

[His Lordship, after referring to the facts, said that he could not hold that there had been such an acquiescence on the subject of the arbitration as that it imposed any liability, whatever might be its results, upon the Defendants in that suit. If the case had only to be decided as far as he had at present tried it, he should be bound to say there was no case on which the Defendants, as partners in the firm of *Trotter Thomas & Co.*, could be held liable to pay any of the money awarded against *Thomas* and *Teague*, but it was by no means upon that point only that this case was to be decided, for he thought it was clear upon the evidence—written evidence, not the opinion of parties, but upon plain written evidence which was clear—that there never was any question referred to arbitration in which the partnership *quâ* partnership had a particle of interest. Not only were they nowhere named in it, but in every one of the letters, and upon the other written evidence which existed in the case, it was clear that they were entirely out of sight. Nothing could be clearer, in his judgment, than that the

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dispute which existed between Mrs. *Loxley* and *Teague* and *Thomas* was confined entirely to her, on the one side, and those two persons on the other, together with the persons who were co-owners with them of the mine.

It was under these circumstances that in August, 1870, the agreement to refer was entered into. The agreement to refer shewed distinctly what were the limits of the reference, what were the subjects to be submitted to the judgment of the arbitrator, and it cannot be said that there was any question affecting the firm of *Trotter Thomas & Co.* excepting the questions which were raised there between the parties who, according to their own statement, were competent to raise it. His Lordship stated the recitals in the agreement of reference, and continued:—]

Can it be said after that, that any question had been raised between Mrs. *Loxley* and the firm of *John Trotter Thomas & Co.?* Is it possible to give any other meaning or signification to those recitals which state the subject of the reference, than that *Teague* and *Thomas*, owners of the mine, were insisting not only upon their rights by way of defence against Mrs. *Loxley*, but were asserting that they had rights against her in respect of trespass committed by her upon the land of which they claimed to be the owners? Then it was agreed that it should be referred to determine "all questions of law and equity as to whether the said *John Trotter Thomas* and *Peter Teague* were and are entitled to work and get the coal within any part of the area aforesaid, and if so, to fix the limits," if they should establish their rights. That was the state of things when the agreement of 1870 was entered into, or in December, 1870, when the letter which I have referred to was written, which announces to Mr. *Atherton* the pendency of the arbitration. The arbitration goes on, and in the result the arbitrator finds there is no foundation for the claim of *Thomas* and *Teague* against Mrs. *Loxley*, and he finds the damage which Mrs. *Loxley* has sustained by the workings within the area which was in dispute, amounted to the sum of £6000. I cannot find upon that evidence that there were any questions submitted to the arbitrator in which *Trotter Thomas & Co.* were in any degree interested. The agreement of 1859 is clear and explicit in its terms. There is no reason to doubt that *Teague & Co.*, the commercial firm, had

taken upon themselves to act as owners, not, as it is said, without the knowledge of *Thomas*, but they undertook to let to *Trotter Thomas & Co.* the mines which are within the disputed area—the east and west sides of the ridge.

I think I cannot, upon such evidence as is before me, adopt that part of the Defendants' construction of the agreement of 1859, which seeks to shew that *Thomas*, being co-owner of one-twelfth of the *Hopewell Colliery*, and therefore entitled to the benefit of the agreement of 1802, although he was acting two parts—for if *Teague & Co.* represented all the owners, then he was represented by *Teague & Co.*, and if they were only a commercial trading company having the benefit of the agreement by which some assignment was made to them, then his character as the manager of *Trotter Thomas & Co.* was perfectly distinct—I say I cannot adopt the argument which has been addressed to me, founded upon the Common Law cases, that *Thomas* did enter into a warranty, and that warranty not having been fulfilled he has come under the liability which the Defendants avail themselves of. But upon the other point, even if the acquiescence had been more clearly proved than I think it has been upon examining what was the subject of the reference, who were the parties to the reference, and what was the thing to be determined in the reference, I am forced to the conclusion that the partnership had nothing whatever to do with it, and that their presence, or such presence as they did afford to the proceedings under the award, does not at all fix upon them that liability which is sought to be fixed upon them. I wish that I could have done with the case there, because up to that point I desire to pronounce my decision without any kind of hesitation whatever. I have endeavoured to shew the ground for my decision, that it was an arbitration which did not concern *Trotter Thomas & Co.*, and no presence of theirs could make them liable for what was done under it. But in that case, if that is the only question, and I believe it is, submitted for my decision, a quantity of subjects wholly unnecessary and unimportant if the Defendants are not bound by the award, have been introduced. They have, therefore, a plain legal defence; they had no doubt about that. They have not only imputed to Mr. *Thomas* dishonest intentions and

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dishonest practices, for which there is not a particle of foundation, but these gentlemen who in their own person and by their predecessors go back for fifty years in a trade which has been carried on profitably, this mining partnership, find it right, now that this matter has become the subject of a quarrel between them, to impeach Mr. *Thomas's* conduct in a manner which I think is wholly unjustifiable. I can discover nothing in the conduct of Mr. *Thomas* in his cross-examination or in his affidavits which would warrant such an imputation. I think he has properly discharged the duty which by common consent the Defendants vested in him and placed upon him, and that he has done the best that could be done for the partnership in which he was interested. But what excuse is there for the Defendants having raised the question upon the Commissioners' award? What is it to them what the Commissioners' award is? The arbitration has ended—the award has been made; nobody can set aside that award, and nobody can properly canvass, criticise, or impugn it—I cannot, for I have no means of knowing what evidence was before the arbitrator, except, as I have already said, there was upon the one side the Plaintiff and his son, and upon the other side the evidence of one surveyor, if not two, who has made an affidavit in this matter. The mistake the Plaintiff has made, in my opinion, is that which is very often made, and fatally made. He has undervalued his opponent; he thought that Mrs. *Loxley's* case could be pooh-pooh'd, that there was no foundation for it, and relied upon his reading of the Commissioners' award. I can only say, if I had to deal with it as a matter from the beginning, reading the Commissioners' award, reading the description of a ridge of coals, and a tract of coal which is granted in the *Hopewell Colliery*, and the tract of coals which is granted in the *Thatch* or *Independent Colliery*, and finding that it is distinctly prescribed that the *Thatch* or *Independent* boundary is to be that level line, and they are to keep to the west of it, I should not entertain any doubt that the boundaries, as Mr. *Thomas* believed them to exist, were the true boundaries. My doubts would not be removed by the evidence of Mr. *Huxham*. Mr. *Huxham*, a gentleman from *Swansea*, is brought to lay down the law in the *Forest of Dean*, where laws of very great antiquity,

of great peculiarity and nicety, prevail; where the question of boundaries can only be decided by persons acquainted with the customs of the place, knowing the surface and underground working, being competent to translate into plain English those ambiguous or mysterious expressions which are found in the Commissioners' award about "in the land," and "the old workings"— most critical expressions, because upon the true interpretation of them depend the rights of the parties in this case. Mr. *Huxham* is brought here, and the Defendants have brought up the model which Mr. *Huxham* made, in which he treated the ridge of coals, which he gave no description of in the Commissioners' award except that it is a ridge of coal, as a thing having a backbone or an apex, so that a line could be drawn from north to south, as if it were a thing in existence; he has made a map which is annexed to the award, it seems, for which there is not the slightest foundation or reason, so far as I can find in the evidence. I say so because all this evidence has been thrust upon me by the Defendants for consideration. Giving to it the best consideration I can, I say it proves the Plaintiff's case, it proves that there has been no trespass, and, but for this unfortunate award, it would be vain for Mrs. *Loxley*, or any one else, to say that, looking at the words of the award, and attending to the evidence of a man who points out where the old workings are made by a certain *James Teague* many years ago, a fixed boundary is easily ascertained. In my judgment there is no ground for saying that any trespass has been committed. It is much too late to bring that forward as a subject for decision; but I cannot properly pass by it without saying what I have said. But upon the question of the costs of this suit it has a very great bearing. How can the Defendants thrust upon Mr. *Thomas*, who come here to ask that they may contribute, the charge that he has committed the trespass, when the question as between him and Mrs. *Loxley* was decided by the award of the Commissioners? For what possible reason or useful end could all that evidence have been gone into? I am unable to furnish an answer to that question. It did not concern the Defendants in the slightest degree, the award has to do with the Plaintiff. It does not concern them at all. But for some reason, which I can ascribe

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only to the unfortunate quarrel which had taken place between the parties, they think it right by producing models, by filing affidavits and examining witnesses, to try and get out of the thing which was in dispute between the parties, and to fix upon the Plaintiff the costs of that part of the case to which they would be entitled generally in the costs of the suit. There can be no order for costs of the suit as far as it is a partnership. The Plaintiff is liable, in my judgment, to pay to the Defendants the costs of so much of the suit as claims contribution under the award. They are entitled to no other costs, and no other costs ought to be included in the taxation.

So much of the bill as seeks to charge the Defendants with contribution to the sum awarded by the arbitrator will be dismissed with costs, and no other costs.

C. A.

The Plaintiff appealed. The appeal came on for hearing on the 15th of November.

Argument.

*Benjamin*, Q.C., and *J. G. Wood*, for the Appellant:—

The case made by the Defendants, that the Plaintiff knowingly trespassed on coal to which he knew that he had no right, is completely disproved. The case of fraud therefore fails, and even if the decision of the Vice-Chancellor is affirmed in other respects, we ought to receive the costs of so much of the suit as relates to the question of fraud. The Plaintiff acted perfectly *bonâ fide*, and the action was brought against him in his character of partner. The other partners when they knew of the arbitration acquiesced in it in the most decided way, and are therefore bound by the result. The amount which the Plaintiff may be called upon to pay ought therefore to be treated as a partnership debt.

*Kay*, Q.C., Sir *H. Jackson*, Q.C., and *Stirling*, for the other partners:—

The Plaintiff, with the most ordinary care, might have ascertained that he was committing a manifest trespass. He was, therefore, guilty, at all events, of gross negligence, especially in going on after Mrs. *Loxley's* notice without consulting his partners.

A loss arising from such conduct must be borne by the partner who causes it: *Lindley* on Partnership (1); *Bury* v. *Allen* (2); *Campbell* v. *Campbell* (3).

*Benjamin*, in reply.

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Judgment, C. A.

Dec. 2. The judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.) was now delivered by

JAMES, L.J.:—

This is a suit for contribution by the managing partner or co-owner of certain coal workings against his co-partners or co-owners in respect of damages awarded by reason of a trespass on the coal property of an adjoining proprietor.

An action was brought by such proprietor, Mrs. *Lucy Loxley*, against the Plaintiff and one *Teague*, who agreed to refer all the matters in dispute to the late Mr. *Osborne*, Q.C., and on his declining to proceed with the arbitration, to Mr. *Eddis*, Q.C. The matters in dispute were, first, the question of title, viz., whether there had been in fact any such trespass, and, if so, what was the amount of damages. The actual working was, beyond all question, by the co-partnership of which the present Plaintiff and Defendant were members, and, as between *Lucy Loxley* and them, they were undoubtedly liable to answer for the trespass, if trespass there in fact was, and she, of course, had a right to sue any one of them without making the others co-Defendants. But she did make *Teague* a co-Defendant. *Teague* was one of the persons under whom the co-partnership claimed title to work, and who were therefore the persons interested in the question of title, and who might be liable to indemnify the co-partnership if they were cast in the suit. After the action brought and the reference to arbitration made, the fact of such arbitration was for the first time brought to the knowledge of the co-partners or their solicitors. The Plaintiff alleges that they assented to such arbitration and took an active part in it.

(1) 3rd Ed. pp. 780, 804. (2) 1 Coll. 589.
(3) 7 Cl. & F. 166.

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The arbitrator decided that Mrs. *Loxley* had established that the workings were trespasses on her property, and that she was entitled to £6000 damages in respect thereof, and he awarded the same, together with the greater part of the costs of the arbitration, to her. Hence this suit for contribution. The Vice-Chancellor decided against the Plaintiff, on the ground that a partner has no right to refer to arbitration so as to bind his co-partners without their concurrence, and that the acquiescence and assent, so far as there was acquiescence or assent to such arbitration, was made without the knowledge of certain material facts and circumstances connected with the litigation which the Plaintiff ought to have communicated to them, and in fact that there never was any question referred to arbitration in which the partnership, *quâ* partnership, had a particle of interest. We are unable to concur in that view. The difference between the view taken by the Vice-Chancellor and ourselves is probably mainly due to the view which we take of what was the only legal and equitable effect of the arbitration as between the co-partners themselves. If the assent to that arbitration created a liability, or amounted to an acknowledgment of a liability, we should have concurred with the Vice-Chancellor that they were not bound by the acts and communications relied on as evidencing such assent. But we are of opinion that no liability was thereby created as between the partners which did not previously exist, and no liability was thereby acknowledged. The only effect of the arbitration, according to our view of it, was to substitute the award of the arbitrator for the verdict of a jury, and the judgment of the Court thereon. It was merely a matter of machinery. Such a mode of determining the questions in dispute was almost a matter of course. The Defendants, the co-partners, had every fact before them required to enable them to judge whether they would or would not assent to the arbitration proceeding. They were aware that they had or might have a very considerable interest in the action. The trespasses, or acts supposed to amount to such trespasses, were done by their agents and workmen. The nominal Defendants were their managing partner and one of their lessors. What questions might afterwards arise as between them and the lessors, or between them and their

managing partner, were wholly immaterial to the determination of the question whether, so far as they were concerned, they would assent to Mrs. *Loxley's* right and claim being determined and ascertained by an arbitrator. They assented under the supposition that they were in the ordinary position of co-partners in respect of an action brought against their co-partner for a partnership act, that is, under the supposition that they had the greatest possible interest in the machinery by which that action was to be determined. It is scarcely possible to conceive that any sensible persons would have done otherwise than assent, and if they were aware of circumstances which would or might possibly or probably relieve them from all liability whatever in respect of the action, that certainly could have had no tendency to induce them to withhold their assent. They would, of course, have said, If we are liable to contribute, we assent to the machinery by which the amount is to be ascertained. If we are not liable, the machinery does not concern us.

We are of opinion, therefore, that so far as the arbitrator decided that the acts were trespasses, and that the damages were £6000, the co-partnership is bound by that decision in the same way and to the same extent as if the action had gone on to trial, and damages to that extent had been given by a jury.

It must be added to this, that beyond all question the only person liable to damages in Mrs. *Loxley's* action was *Thomas*. *Teague* might be liable to indemnify *Thomas*, and if the litigation had proceeded in its normal course, which would probably have been not only the action at law but a bill in equity, he would have been liable to costs; but in the mere action at law for the trespass he must have been entitled to a verdict of not guilty.

We have then to consider the question whether *Thomas* would or would not have been entitled to contribution on a judgment against him for £6000 for the trespasses. *Primâ facie*, damages given against one partner for a partnership act are to be paid like any other partnership debt, but with this exception, that if the damages were occasioned by the personal misconduct or culpable negligence of one partner, he alone must bear the consequences. In this case the Defendants do charge the Plaintiff with such misconduct

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or negligence. To dispose of this charge it is necessary to go into the history of the circumstances under which the trespasses or acts found to be trespasses were committed. [His Lordship here stated the facts as given above, down to and inclusive of the agreement of the 22nd of February, 1859.] Under that agreement *Trotter Thomas & Co.* worked in the *Hopewell Colliery*, and, as was alleged by Mrs. *Loxley* and found by the arbitrator, trespassed beyond the boundary into her coal.

The Plaintiff was the managing and resident partner, and it is charged against him that such trespasses could not have occurred without very serious and culpable neglect on his part. Certain it is that it is one of the most important duties of the manager of a colliery, not merely a duty to his neighbours but to his principals, to keep carefully within his boundary. The consequences of not doing this are most serious. In the present case the profit at most could have been but very small, the net surplus of the selling price, after all the expenses of working and the royalty, while the owners, according to the law as then understood and applied, and as it was understood and applied by the arbitrator, would be entitled to the full value of the coal at the pit's or level's mouth, without any deduction for the costs of severance, or any other deduction, except for the expense of conveying it, after severance from the vein, to the surface.

To the Commissioners' award were annexed plans of the *Hopewell Colliery* and *Thatch* or *Independent Colliery*, and any one looking at those plans must have seen that the workings had transgressed the boundary line as there depicted. The Plaintiff *Thomas* acted with culpable carelessness if he never looked at the plans, and with most culpable recklessness if, looking at the plans, he determined to disregard them. Before the arbitrator, and at the hearing before us, it was strenuously contended that the inaccuracy of the plans was notorious in the forest; that the Commissioners could only have made them approximately; and that, correcting the plans by the written descriptions, it was reasonably clear that the *Hopewell Colliery*, as awarded, did extend to and include the area in which the alleged trespasses were committed. And the Vice-Chancellor appears to have adopted this view, differing in that

respect from the arbitrator. We have had a most minute examination of the plans and of the written descriptions by the counsel of both sides, and we find it impossible to adopt the Plaintiff's contention. But, moreover, there being in existence plans made by the Commissioners themselves in pursuance of the Act of Parliament, and made by law part of their award, nothing could be more rash or reckless than to take all the risk of disregarding those plans on the chance of establishing a construction of the letterpress against the plans, the utmost profit being so trifling and the loss risked so great. It was a speculation which no partner had a right to involve his co-partners in without their full knowledge and concurrence.

But the case does not stop there. It is manifest that this supposed error in the map and this supposed construction of the writing was a mere afterthought of the lawyers after the arbitration had been agreed on. It is not pretended that Mr. *Thomas* ever looked at the plans and letterpress, and came to the conclusion which was pressed before the arbitrator and in this suit. And it is manifest that even if he had examined the two he would have taken advice on the subject. But the matter does not stop there. After he had worked to some considerable extent, Mrs. *Loxley* discovered the fact, and in 1864 gave formal notice thereof, and required an account of the past trespasses and a discontinuance of them for the future. In answer to that notice we find that it was never suggested that the disputed coal was included in the *Hopewell Colliery* as awarded and set out by the Commissioners. But a claim wholly inconsistent therewith was made to it as part of the *Thatch* or *Independent Colliery*, under an equitable or supposed equitable title under an agreement made as far back as the year 1802 between the then owners of the *Thatch Colliery* for a partition. It is difficult to see how any title under such agreement could have survived the statutory provisions and the Commissioners' award; and even if there were any express equity or trust affecting the legal estate, it is difficult to see how such equity or trust could have survived all the changes and devolutions of title, or how Mrs. *Loxley* could have become under it a trustee for *Peter Teague & Co.* and their co-owners. In fact, it is idle to treat that document as creating the relation of trustee

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and *cestuis que trust*. It was a legal partition, giving one party one pit and workings, and the other party another pit and workings, and was precisely the right which was to be brought to the notice of the Commissioners, and in default extinguished. At all events it is obvious that a right so doubtful, so apparently desperate, was not one under which the Plaintiff had the slightest excuse for imperilling his partners, exposing them to the liability actually shewn by the arbitration, and without any chance of substantial benefit.

It is not immaterial that the Plaintiff was himself one of the persons claiming title under this agreement. We do not think that this in any way impugns the honesty of his conduct, for we believe that throughout the whole of the proceedings down to the time of the award, the Plaintiff really thought that his partners had no substantial interest in the matter—that the question was one of title between Mrs. *Loxley* on the one hand, and the owners of the *Hopewell Colliery* on the other, and that the latter, under whose title the workings were held, were the persons really interested and really bound to bear any loss. But that affords no legal excuse for the want of reasonable care which he shewed as between him and his co-partners. It was strongly insisted on before us that, at all events, we ought to draw a line at the time of the notice in 1864. We cannot accede to that contention. We think the carelessness and recklessness were only aggravated by persisting to work after notice. The action, moreover, was brought in December, 1869, the notice was in May, 1864, and the *Statute of Limitations* was, with apparent success, insisted on. And it is impossible to say how much the arbitrator was influenced in his findings by the fact that the trespass was deliberately persisted in after express notice. The damages given for such a trespass would probably be very different from those of a mere casual or accidental encroachment beyond the boundary. It is impossible to speculate what the result would have been to any one if the Plaintiff had, as he ought to have done immediately on the notice, discontinued the workings in the disputed area.

On these grounds we feel bound to affirm the Vice-Chancellor's decree. It was very strongly pressed on us that we should make a distinction as to costs, on the ground that actual fraud was

imputed to the Plaintiff, which was not sustained. But however much it is to be regretted that any such imputation should have been made either in pleading or argument, all the evidence to support the imputation of fraud was really the evidence of the facts and circumstances on which we have come to the conclusion we have expressed adverse to the Plaintiff, and we are unable to relieve him from any part of the costs which the Vice-Chancellor directed him to pay. The appeal must be dismissed with costs.

Solicitors: *Rogerson & Ford; Barnes & Bernard; Jones & Starling.*

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[1878 A. 62.]

*Municipal Corporation—Opposing Bill in Parliament, Expenses of—Charging Borough Fund—Interference with Corporate Rights—Municipal Corporations Act*, 1835 (5 & 6 *Will.* 4, *c.* 76), *s.* 92—*Municipal Corporations* (*Borough Funds*) *Act*, 1872 (35 & 36 *Vict. c.* 91), *s.* 8.

Municipal corporations having been reduced by the *Municipal Corporations Act*, 1835, from the position of owners of property to that of trustees, possess the ordinary right of trustees to defend their trust property and their rights as trustees from attack at the expense of the trust estate.

Consequently, a municipal corporation has the right, either under sect. 92 of the *Municipal Corporations Act*, 1835, or under the general law applicable to trustees, to defray, out of the borough funds or rates, the expenses of any attack made by bill in Parliament, whether against their existence as a corporation, or against their property, or only against their rights, powers, or privileges; and that right is not taken away by the *Municipal Corporations* (*Borough Funds*) *Act*, 1872.

*Bright* v. *North* (1), *Attorney-General* v. *Corporation of Wigan* (2), and *Reg.* v. *Mayor of Sheffield* (3), considered.

Statement.

BY an Act of Parliament passed in 1838 (1 Vict. c. 12, Loc. and Pers.) the Corporation of *Brecon* were empowered to purchase lands in the borough of *Brecon* for new market-places; to erect a market-house and buildings; to make regulations for the management of the markets; to provide slaughter-houses, and to levy tolls.

By sect. 34 the corporation were empowered to apply the tolls authorized by the Act, after payment thereout of the expenses incident to providing the market-places, first, in setting apart such sum as with the tolls receivable by the corporation from their other property should be necessary to make up the annual sum of £210, the amount of the net annual income of the corporation from the whole tolls of the borough and their other property; of which sum of £210 a competent part was to be applied in defraying the interest on incumbrances affecting the corporation property, and the remainder was to be applied by the corporation

(1) 2 Ph. 216. (2) Kay, 268; 5 D. M. & G. 52.
(3) Law Rep. 6 Q. B. 652.

"to such purposes and in such manner as they were by law then authorized and empowered to apply their said net annual income" (that is to say, as directed by sect. 92 of the *Municipal Corporations Act*, 1835); and afterwards such surplus tolls were to be applied in or towards payment of interest and capital on mortgages made under the Act; and subject thereto, the whole of the surplus tolls were to be applied by the corporation "to such purposes of public benefit within the said borough as to them should seem meet."

The corporation built a market-house under their Act, but having failed to provide new market-places and slaughter-houses, an Act was passed in 1862, intituled the "*Brecon Markets Act*, 1862," authorizing a company called the "*Brecon Markets Company*" to provide the necessary market-places and slaughter-houses. This Act contained the following provisions:—

By sects. 21 and 22 the markets and fairs in the borough, the market-house, market-places, and the works and conveniences connected therewith, the tolls, lands, and other property of the corporation were vested in the company, with the exception of the guildhall and police-station, and a sum of £200 due to the corporation as compensation for certain land taken for the county gaol.

Sect. 42 provided that from and after the commencement of the Act the yearly sum of £210 should be paid to the corporation by the company in substitution for the annual sum of £210 mentioned in the Act of 1838.

Sect. 43 provided that the annual sum so to be paid by the company should be a first charge on the tolls, markets, and market-places vested by the Act in the company, and (sect. 44) should be applied in the manner mentioned in sect. 34 of the Act of 1838.

Sect. 65 provided that the company might, from time to time, if and when they thought fit, "and with, but not without the consent of the corporation," provide and maintain proper slaughter-houses upon such sites as they thought expedient.

Sect. 80 provided that the company should not at any time lower, raise, or alter any of the tolls, without in every case the consent of the corporation.

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Sect. 82 empowered the company to let the markets and fairs, market-houses and market-places and places for fairs, and the slaughter-houses and tolls, for any period not exceeding three years.

Sect. 89 provided that the company and the corporation might from time to time enter into and carry into effect all such contracts with respect to any of the purposes of the Act, and in accordance with the provisions thereof, as they respectively thought fit.

Sect. 90. "Except only as by this Act expressly provided, nothing in this Act contained shall take away, lessen, prejudice, or alter any of the jurisdictions, franchises, estates, rights, interests, powers, authorities, privileges, or immunities of the corporation."

Acting under the powers of this Act, the company provided a cattle market in the borough, and also erected slaughter-houses on a site selected and approved of by the corporation, but the corporation refused to give their sanction to the company using the slaughter-houses, on the ground, as it appeared from the evidence, that their accommodation was insufficient, and that in other respects they were not suited to the requirements of the town, and would create a serious public nuisance.

The company thereupon, in 1878, with the sanction of the Local Government Board, presented a bill in Parliament for the extension of their powers. The bill when introduced into Parliament contained the following clauses:—

2. Power for the company "to use and maintain the slaughter-houses already provided and erected by them on the site selected by the corporation as aforesaid .... without any further consent from the corporation;" such slaughter-houses to be deemed part of the market-place.

5. Power for the company from time to time, as or when they thought fit, to lower the tolls, "notwithstanding that they might not have obtained the consent of the corporation thereto, as required by the 80th section of the Act of 1862."

6. Power for the company to let the markets, &c., for ten years, instead of three only, as provided by sect. 82 of the Act of 1862.

9. Power for the company to sell their markets, property, and undertaking, or any part thereof, to the corporation.

14. Power for the corporation to raise the purchase-money by borrowing on mortgage of the premises purchased.

17. The company to be exempted from parochial rating in respect of the annual sum of £210, payable by them to the corporation under the Act of 1862.

The bill was petitioned against and opposed by the corporation, but a petition in favour of the bill as it stood was presented by a very large number—the majority, it was said—of landowners and ratepayers of the borough.

The bill was eventually passed by the Committees of both Houses of Parliament, and received the royal assent under the title of the "*Brecon Markets Amendment Act*, 1878." However, during the passage of the bill through Parliament the corporation insisted on several amendments, some of which were adopted. In particular, at the instance of the corporation, clause 2 was ultimately amended by directing that the slaughter-houses should be completed, altered, or constructed according to plans to be approved by the Local Government Board; and clauses 6 and 17 were entirely expunged.

The corporation having proposed to charge the expenses incurred by them in opposing the bill upon the funds or rates of the borough, this action was instituted against the corporation by the Attorney-General, at the relation of two ratepayers of the borough, for an injunction restraining the corporation from charging or attempting to charge any of such expenses upon the borough fund or borough rate, or any other fund or rate under the control of the corporation, or upon any part or parts of such funds or rates respectively; and from applying any moneys produced or to be produced by any rates or funds under the control of the corporation in or towards the payment of any of the said expenses, unless and until such consent and sanction to the said opposition to the said bill, and the charge and payment of the expenses thereof upon or out of such funds or rates should have been given as required by the *Municipal Corporations* (*Borough Funds*) *Act*, 1872 (35 & 36 Vict. c. 91).

The statement of claim alleged, and it was admitted by the

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Defendants, the corporation, that no resolution had ever been passed by the corporation, or the council thereof as a governing body, or by the owners and ratepayers of the borough in accordance with the provisions of the *Municipal Corporations* (*Borough Funds*) *Act*, 1872, or otherwise, charging or consenting to charge the expenses of the corporation's opposition to the bill on the funds or rates of the borough or any part thereof; that no meeting of the corporation, or the council thereof, had in fact ever been summoned for the purpose, and no meeting of the owners and ratepayers of the borough had ever been held or summoned for the purpose of considering whether such expenses should be charged on or paid out of the funds or rates of the borough, or how the expenses should be borne; and that no approval of any such step by the Local Government Board of the borough had ever been given or applied for by the corporation.

The corporation in their statement of defence denied that they were bound to comply with the provisions of the *Municipal Corporations* (*Borough Funds*) *Act*, 1872, and claimed to be exempt from complying with the provisions of sect. 4 of the said Act on the following grounds: (1) that the bill introduced by the company would, if passed into law in the form in which it was introduced, have been prejudicial to the rights and interests of the burgesses and inhabitants of the borough; would have legalised the creation and continuance of public nuisances within the borough; would have deprived the corporation of rights, powers, and privileges conferred on them by the Municipal Corporations Acts and the other Acts in force relating to the borough; and would have deprived the corporation and the burgesses of a considerable part of the income which they derived from the borough rate: (2) that the opposition complained of, and the incurring of the expenses complained of, were proper and necessary for the public benefit and interests of the burgesses and inhabitants of the borough, and for the protection of their rights and property, and for carrying into effect the provisions of the Municipal Corporations Acts and the other Acts relating to the borough, and had been duly sanctioned and directed by the council of the borough: (3) that under the Acts of 1838 and 1862 the corporation had a surplus borough fund applicable for payment of the expenses complained of, and out

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of which they were entitled to defray such expenses: (4) that the payment of such expenses was authorized by the *Municipal Corporations Act*, 1835 (5 & 6 Will. 4, c. 76), s. 92: (5) that the corporation had done all things necessary to entitle them to pay such expenses out of the said surplus fund: and (6) that the power of the corporation to charge and pay such expenses on and out of the said surplus fund without complying with the provisions of sect. 4 of the *Municipal Corporations* (*Borough Funds*) *Act*, 1872, was saved to them by the 8th section of that Act.

The corporation further contended that under the provisions of sect. 92 of the *Municipal Corporations Act*, 1835, they were entitled, under the circumstances, to pay the expenses in question out of the borough fund as well as out of the surplus fund.

The Attorney-General alleged in his reply that the surplus fund referred to by the corporation in their defence formed part of the borough fund within the *Municipal Corporations Act*, 1835; that the Defendants were one of the corporations named in Schedule A to that Act; that they had no surplus of their borough fund within that Act; and that they had no power, either under that Act or otherwise, to charge the expenses incurred by their opposition to the bill in question upon any of the funds, rates, or properties of the borough.

From the evidence on the part of the ratepayers it appeared that after bringing into account the sums payable under sect. 34 of the Act of 1838, and sect. 42 of the Act of 1862, and providing for the matters specifically mentioned in sect. 92 of the *Municipal Corporations Act*, 1835, there was no surplus fund applicable for the public benefit within the meaning of the latter Act.

Issue having been joined, the action now came on for trial.

Argument.

*Whitehorne*, and *Macnaghten*, for the Attorney-General:—

There being no surplus fund under the Act of 1838, the corporation have no power to apply the borough funds or rates in payment of the expenses of opposing this bill. They might possibly have done so had they obtained the sanction of the ratepayers by special meeting for the purpose under sect. 4 of the *Municipal Corporations* (*Borough Funds*) *Act*, 1872; but that they failed to do; therefore that Act does not apply to the present case.

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The whole question then turns upon the meaning of sect. 92 (1) of the *Municipal Corporations Act*, 1835; that is to say, the question is whether these expenses are to be considered as "expenses necessarily incurred in carrying into effect the provisions of that Act."

In the first place, we submit that those words do not include opposing a bill in Parliament; nor have the corporation brought themselves within the clause immediately following, as to the application of the borough fund "for the public benefit of the

(1) The material parts of sect. 92 of the *Municipal Corporations Act*, 1835 (5 & 6 Will. 4, c. 76), are as follows:— "After the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to any body corporate named in conjunction with the said borough in the said schedules (A) and (B), or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this Act (the application of which has not been already provided for) shall be paid to the treasurer of such borough: and all the moneys which he shall so receive shall be carried by him to the account of a fund, to be called 'The Borough Fund'; and such fund," subject to the payment of debts, &c., "shall be applied towards the payment of the salary of the mayor, and of the recorder and of the police magistrate hereinafter mentioned when there is a recorder or police magistrate, and of the respective salaries of the town clerk and treasurer, and of every other officer whom the council shall appoint, and also toward the payment of the expenses incurred from time to time in preparing and printing burgess lists, ward lists, and notices, and in other matters attending such elections as are herein mentioned, and, in boroughs which shall have a separate court of sessions of the peace, as is hereinafter provided, towards the expenses of the prosecution, maintenance, and punishment of offenders, and towards such other sum to be paid by such borough to the treasurer of such county as is hereinafter provided, and towards the expense of maintaining the borough gaol, house of correction, and corporate buildings, and towards the payment of the constables, and of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act, and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants and improvement of the borough . . . And in case the borough fund shall not be sufficient for the purposes aforesaid, the council of the borough is hereby authorized and required from time to time to estimate, as correctly as may be, what amount, in addition to such fund, will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this Act; and in order to raise the amount so estimated the said council is hereby authorized and required from time to time to order a borough rate in the nature of a county rate to be made within the borough," &c.

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inhabitants," inasmuch as there is no surplus fund: *Reg.* v. *Mayor of Sheffield* (1).

It is true that in *Attorney-General* v. *Corporation of Wigan* (2), the expenses of a parliamentary opposition were allowed, although there was no surplus fund: but all the Court there decided was that it would not grant an interlocutory injunction to prevent such an application of the borough fund; no rule being laid down as to what would be done at the hearing. Moreover, that decision is commented upon with disapproval by the Court of Queen's Bench in *Reg.* v. *Mayor of Sheffield.*

The corporation will probably rely on *Bright* v. *North* (3), *Attorney-General* v. *Andrews* (4), and *Attorney-General* v. *Mayor of Norwich* (5), as authorities that a corporation may apply their funds in resisting a bill in Parliament; but those decisions went upon the ground that such a resistance was justifiable if the bill prejudicially affected the property of the corporation, or threatened their existence as a corporation.

Secondly, assuming that sect. 92 would authorize such an expenditure if the opposition were necessary for the defence of the property or existence of the corporation, then we say that that was not the case here; for the existence of the corporation was certainly not threatened by this bill, and as regards property they had none, inasmuch as by the Act of 1862 their entire property, with trifling exceptions, was transferred to the company.

Thirdly, the corporation, being in the position of trustees for the ratepayers, are bound, if they expend their trust-money in protecting the trust property, to shew that the expenditure is reasonable and proper—as was laid down by Lord Justice *Turner* in *Attorney-General* v. *Corporation of Wigan* (6), and by Mr. Justice *Blackburn* in *Reg.* v. *Mayor of Sheffield* (7). But here we shew that the expenditure was neither reasonable—for a majority of the ratepayers were in favour of the bill—nor proper, for the corporation who, before the passing of the *Municipal Corporations (Borough Funds) Act*, 1872, might have maintained their right to

(1) Law Rep. 6 Q. B. 652.
(2) Kay, 268; 5 D. M. & G. 52.
(3) 2 Ph. 216.
(4) 2 Mac. & G. 225.
(5) 2 My. & Cr. 406.
(6) 5 D. M. & G. 55.
(7) Law Rep. 6 Q. B. 663.

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act on their own judgment as to whether it was proper to oppose or not, had by that Act a special means provided to enable them to ascertain the opinion of the ratepayers; so that, by not having adopted the course so provided for them, their responsibility has been proportionately increased.

Argument.

*Ince*, Q.C., and *R. S. Wright*, for the Defendants, the Corporation:—

The 92nd section of the *Municipal Corporations Act*, after providing that the borough fund, that is, the income of the corporation property, may be applied towards the expenses "which shall be necessarily incurred in carrying into effect the provisions of the Act," goes on to provide that, "in case the borough fund shall not be sufficient for the purposes aforesaid," the council of the borough may order a borough rate in the nature of a county rate; and that such a borough rate, "subject to the provisions hereinbefore contained, shall be applied to all purposes to which before the passing of this Act a borough rate or county rate was by law applicable in such borough or county." According to the general law, and looking at the intention of the Act as shewn by the preamble, coupled with sects. 90 and 92, we submit that we were entitled to defray these expenses out of the borough fund or by a borough rate, as being "expenses necessarily incurred in carrying into effect the provisions of the Act," the corporation being—as Lord *Hatherley*, when Vice-Chancellor, said in *Attorney-General* v. *Corporation of Wigan* (1)—responsible for the good rule and government of the town, and therefore justified in opposing any encroachment on their authority.

The question then is, were not the rights of the corporation, as the governing body of the borough, sought to be interfered with by this bill to such an extent as to justify their opposition? Looking at the bill as originally introduced, it is impossible not to come to the conclusion that it very materially interfered with existing rights of the corporation; for, amongst other things, it sought to dispense with their consent as to the user of the slaughter-houses—a very important matter on sanitary grounds; also to enable the company to lower the tolls without the consent

(1) Kay, 277.

of the corporation; also to give a power of purchasing to the corporation—which surely entitled the corporation to have a voice in the settlement of the terms on which such purchase should be made; and to exempt the company from parochial rates in respect of the annual sum of £210 payable by them, thus throwing an additional burden on the other ratepayers.

In *Attorney-General* v. *Corporation of Wigan* (1), it was held that, under sects. 90 and 92 of the *Municipal Corporations Act*, the corporation, whether they had any surplus borough fund or not, were, by virtue of their right to prevent a nuisance, justified in applying their funds in opposing a bill for legalising the abstraction of water from a river which constituted the main sewer of the town. So here we say that this bill proposed to legalise what would, in the opinion of the corporation, have occasioned a serious nuisance; for the bill sought to deprive the corporation of their control over the user of the slaughter-houses. We therefore come strictly within *Attorney-General* v. *Corporation of Wigan*.

*Reg.* v. *Corporation of Tamworth* (2) is an authority that costs of litigation undertaken *bonâ fide* and on reasonable grounds for the defence of corporate rights, may be paid out of the borough fund, though such litigation is eventually unsuccessful. In the present case the corporation had distinct rights, which, we submit, they were entitled to defend just as much as if their property, and not merely their rights, had been attacked.

[They were stopped by the Court.]

*Whitehorne*, in reply:—

In all the cases in which corporations have been allowed the expenses of opposing a bill in Parliament, the bill has sought to interfere with actual property of the corporation, not simply with their powers.

We submit that this case is covered by *Reg.* v. *Mayor of Sheffield* (3), where the Court of Queen's Bench considered that *Attorney-General* v. *Corporation of Wigan* was decided on technical grounds, and expressed dissatisfaction with the Vice-Chancellor's view of the meaning of the *Municipal Corporations Act*.

(1) Kay, 268; 5 D. M. & G. 52. (2) 19 L. T. (N.S.) 433.
(3) Law Rep. 6 Q. B. 652.

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[JESSEL, M.R.:—It is singular that *Bright* v. *North* (1) does not appear to have been cited in *Reg.* v. *Mayor of Sheffield* (2). It is certainly unfortunate that it was not considered by the Court of Queen's Bench.]

*Bright* v. *North* is, no doubt, the strongest case against me, but it is distinguishable on the ground that there was actual property, namely, river banks, which the bill threatened to affect injuriously; whereas in the present case there was no interference with property at all.

This bill imperilled neither the property nor the existence of the corporation. At most, it affected only certain of their rights: and surely a corporation is not entitled to apply its funds in opposing every bill that may affect them, however incidentally. What Lord Justice *James*, when Vice-Chancellor, said in *Attorney-General* v. *West Hartlepool Improvement Commissioners* (3) is very applicable to this case: "One cannot but feel that if there were an unlimited power for bodies of this kind to apply, whenever they might think fit, to Parliament at the expense of their constituents, they themselves having determined to do it of their own mere motion, without calling a general meeting of the ratepayers . . . one can easily see there would be a great deal of that class of professional business got up which would be done at the expense of the ratepayers."

We submit, therefore, that this opposition, having been conducted against the wishes of a majority of the ratepayers, and without any attempt first to ascertain the opinion of the general body upon the subject, was unreasonable and improper; and that, consequently, the burden of defraying the expenses of an opposition so conducted should not be thrown upon the ratepayers.

Judgment.

JESSEL, M.R.:—

The case before me is one of a very special character, and one which, as far as I know, has never occurred before. It raises important questions both as regards the meaning of public Acts of Parliament and as regards the general law.

(1) 2 Ph. 216. (2) Law Rep. 6 Q. B. 652.
(3) Law Rep. 10 Eq. 152, 157.

In the first place, there is no doubt that the Municipal Corporations Acts were intended to impose great restrictions on the dealings by municipal corporations with the corporate funds. In substance, whatever the words used were, the *Municipal Corporations Act*, 1835, reduced municipal corporations from the position of owners of property to the position of trustees of property. Instead of having the power which such corporations possessed before the passing of the Act—and sometimes abused—of disposing of their property pretty well in any way they thought fit, they were restricted to certain definite purposes pointed out by the 92nd section of the Act, that being the principal section and the others being merely ancillary. In substance, as I have said, they were reduced to the position of trustees.

The 92nd section provided for certain expenses which, in the case of the borough funds not shewing a surplus over what I will call the ordinary expenses of the borough, were restricted to expenses necessary for carrying the purposes of the Act into execution. Probably more definite words might have been used; for the word "necessary," like most other words in the English language, has only a relative meaning, and what may be necessary in one case may not be so in another; you cannot lay down any absolute rule as to what is necessary.

Now it is manifest, the moment you read the Act, that if you read "purposes" as meaning merely "express purposes," a corporation would be left in this position—that they could not even defend their property or their very existence against attack. If, therefore, the word "purposes" is to be read in the narrowest sense, that is, as meaning the purposes expressed by name in the Act, this would follow, that if an action of ejectment, or what is now called an action for recovery of land, were brought against the corporation to get from them the whole of their landed property, they would not be justified, under the *Municipal Corporations Act*, in incurring the costs of defending that action. That, of course, is too extravagant, and it must therefore be assumed that there is to be found somewhere, either under the word "purposes," as mentioned in the 92nd section, or under the general law, a provision for such a case as that.

Again, if a proceeding were taken to destroy their charter of

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incorporation, either directly or indirectly, it would be absurd to say that the corporation were not entitled to resist those proceedings, and not the less so if the proceedings were by bill in Parliament instead of by action in a Court of Law. Acts threatening the existence of the corporation itself must be resisted, and must be resisted, of course, at the expense of the corporation. Here again, if you read the word "purposes" in the narrow and restricted view, it would be difficult to find any such purpose expressed in the Act; but you must either read it in the larger way, or else you must assume that the Legislature intended that the ordinary rights of corporations in defending themselves against attack, whether by action at law or by bill in Parliament, or otherwise, should be reserved to them. It does not appear to me to be very material to consider which is the proper view to take, because they both conduct you to the same conclusion, that is to say, according to the first view the words to be found in the Act of Parliament imply that there must be a mode of construction which includes such objects; and according to the second view the Act of Parliament reserves the ordinary rights of corporations as of persons to defend themselves.

That being so, and independently of the recent Act of Parliament, what is the principle upon which corporations should be allowed to defend themselves? There are decisions which go expressly to defending their property from attack and defending their existence from attack. Does not the principle go further? The existence of a municipal corporation is an existence not simply for the purpose of affixing a seal, but for the purpose of the government of the town; and therefore if their duties and rights of government are interfered with, their existence is to that extent interfered with, though it is not the actual existence of the corporation. It is the existence of their corporate powers which in fact goes to make up the entire existence of a corporation; and it appears to me that a corporation has the right to defend its powers when attacked, upon the same principle that it has the right to defend its actual existence from attack.

Supposing the corporation has a power to regulate the fairs and markets within the borough, and an individual claims the right, as lord of the manor, to control the regulations of the fairs

and markets, then it is clear the right to make the regulations is in the nature of property—a right to levy tolls, and so on.

But suppose a company is established to take possession of the fairs and markets, and levy the tolls and take them out of the hands of the corporation, and promotes a bill in Parliament for the purpose, there it is also quite clear; but suppose there is no property in the corporation at all, but merely a right to regulate the fairs and markets, that is, to prescribe the places where the fairs and markets shall be held, to prescribe the tolls that shall be taken in respect of them, and to prescribe the times at which the fairs and markets are to he held—is it to be supposed that an individual or a company can present a bill to Parliament for taking away those privileges and duties of the corporation, and that the corporation shall have no power of defending itself, shall have no right to expend the money necessary for defending its privileges and duties as a corporation? It appears to me that the mere statement of the question shews that there is no valid distinction between the right of property—which, after all, is only held by the corporation as trustee for public purposes—and the powers and privileges, forming a larger or possibly a maller share of the government of the town which are conferred on the corporation, and with which it is sought to interfere. As I said before, it seems to me that, on principle, you must imply a right in the corporation to defend itself from such an attack.

Now, if that is so, it is of very little consequence, as I have said, by what means that conclusion is arrived at. I find the Judges in some cases have adopted the one method, that is, they have read the right as implied in the term "necessary expenses" in the Act of Parliament. In others they have adopted the second method, and said the Act of Parliament must be intended to reserve to the corporation the ordinary rights of corporations. It does not appear to me, as I said before, material which method is adopted; but I think it is quite clear that the decisions go to this, that the right of a corporation to defend itself from an attack of this kind extends not merely to property—not merely to the existence of the corporation in the smallest sense, that is, to the continued existence of the corporation as such, but to its existence also in the larger sense, that is, to the existence of the corporation

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with all its rights and privileges; and that an attack on a substantial portion of its privileges, rights, and duties, is as much within the purview of the authorities as an attack on its property or its mere existence.

First of all, as regards authority, the strongest case on the part of the relators is certainly that of *Reg.* v. *Mayor of Sheffield* (1). I by no means say that that case is not, in my opinion, rightly decided, or that I have any cause for criticising it adversely, but it does not go to the extent contended for on behalf of the relators.

The judgment of the Lord Chief Justice goes very much upon the principle that I have mentioned. He says (2), "With regard to the expenses incurred in opposing the bill in Parliament, I think it is abundantly clear, and open to no doubt or question, that that was a purpose to which, looking at the words of the section, it was altogether beyond the scope of the municipal government, or anything to be done under that Act of Parliament in a borough without a surplus fund, to apply the borough funds." "Altogether beyond the scope of the municipal government." That is the ground of his decision. I shall shew presently that in this case the purpose is by no means beyond the scope of the municipal government.

Then his Lordship goes into the reasons for coming to that conclusion, and justifies it. But he then goes on to comment on a case in which I must say a different conclusion to a certain extent seems to have been arrived at; I mean the case of *Attorney-General* v. *Corporation of Wigan* (3); but it is quite plain that the ground of the Lord Chief Justice's decision is that the opposition in question was beyond the scope of the municipal government.

Then Mr. Justice *Blackburn*, in his judgment, says this: "Those are two separate questions; first, whether they might lawfully and properly do what they did; secondly, whether they might charge the borough fund for the purpose." Then, after explaining the object of the Act, he says this:—[His Lordship then read part of the judgment at p. 663, commencing "Now, can we say as to

(1) Law Rep. 6 Q. B. 652. (2) Law Rep. 6 Q. B. 657.
(3) Kay, 268; 5 D. M. & G. 52.

these two matters," down to "the objects of the Acts within the general terms," and continued:—] So that Mr. Justice *Blackburn's* decision comes to this, that inasmuch as the corporation had property, and inasmuch as the income of the property was applicable to the borough fund, the preservation of that property must be considered a purpose of the Act. That is one way of putting it, but he finds it a purpose of the Act by inference; it is not within the express powers. It consequently comes to this, that any necessary incident to property (and there is no distinction in the world that I can see between property and powers for this purpose) is a purpose of the Act.

Again, I will go back to the illustration I have already given, which is very germane to this case, the regulation of the markets. The right of regulating the markets is part of the municipal government of the town: it is part of the rights and privileges enjoyed by the corporation, and is as much within the judgments of the Lord Chief Justice and Mr. Justice *Blackburn* as actual property in the market itself. It is vested in the corporation for the benefit of the town as part of the government of the town; and he who seeks to interfere with the privileges and duties connected with the regulations must be resisted, and, of course, resisted at the expense of the corporation.

It does not appear to me that that judgment at all prevents a corporation defending an attack upon such a portion of its privileges.

Now I come to a case which does not appear to have been cited—and I am sorry it was not—in *Reg.* v. *Mayor of Sheffield* (1). It is a case which, of course, as far as I am concerned, is of higher authority than the judgment of the Queen's Bench, because it is a judgment of the Lord Chancellor. It is the well-known case of *Bright* v. *North* (2). When I come to read that case I find this. There was an Act of Parliament providing for the better conservation of the banks of the River *Ouse*. The lands adjacent to the banks at each side were divided into six districts, and it was provided that the portion of the banks comprised within each district should be maintained by commissioners to be appointed from among the owners of lands of a certain quantity within such

(1) Law Rep. 6 Q. B. 652. (2) 2 Ph. 216.

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district, by means of funds to be levied by a district rate, not exceeding 3*s.* an acre in each year; and the fund so raised was to be applied "in making, doing, constructing, and executing, all such works, acts, matters, and things, as by such commissioners should from time to time be deemed necessary, proper, or expedient for putting so much of the bank as was situate within their respective districts into and for maintaining the same in a permanent state of stability."

As I read the report of the case, and as I know from experience as regards other similar Acts of Parliament, there is no pretence for saying that the ownership of the banks was taken away from the landowners and vested in the commissioners. They were conservators and nothing more.

Now the Lord Chancellor says this (1): "The commissioners of each district are bound by the Act to protect the lands adjacent to the banks"—so they were; they were as much bound to protect the land adjacent to the banks as to keep the banks in order—"from inundation, and they are authorized by the Act to levy a rate on the proprietors of the district to defray those expenses." Again, the lands adjacent to the banks of course did not belong to them. Then it was alleged that the works which were to be undertaken by the promoters of the bill in Parliament which they were opposing might be injurious to the banks; and the question was, whether the commissioners were authorized—having no special power for this purpose—to oppose the bill in Parliament. The Lord Chancellor says this:—[His Lordship read part of the judgment at pp. 220, 221, commencing, "The bill, therefore, raises this proposition," down to "the duties imposed upon them;" and continued:—] It comes therefore to this, that a bill promoted in Parliament which the commissioners thought would injure the lands might be opposed by them on the ground that it was their duty to protect the banks and the lands adjacent, and not on the ground of their having any right of property either in the banks or in the lands adjoining.

*Bright* v. *North* is therefore a decision that a proposed interference by Act of Parliament with the powers of the commissioners

(1) 2 Ph. 219.

and with their duties, is such an interference as fairly entitles them to appear before a Committee of either House to oppose the bill.

When we come to look at the case which was very much commented on in *Reg.* v. *Mayor of Sheffield* (1), namely, the case of the *Attorney-General* v. *Corporation of Wigan* (2), whatever view we take of the construction put upon the *Municipal Corporations Act* by Lord *Hatherley* when Vice-Chancellor, we shall see that he simply founds his decision on *Bright* v. *North* (3) and nothing else. His decision does not rest at all on the notion of injury to property. He reasons out, in a way which has not been satisfactory to the Judges of the Queen's Bench and, if I may humbly say so, is not altogether satisfactory to me, a power in the corporation to restrain nuisances generally; but having found that power and the duty to stop nuisances generally, he then goes on in this way: he says they have a plain duty of taking care there shall be no nuisance in the town. Now assuming he is right so far, then I think there is no possible fault to be found with his judgment. The real difficulty in the judgment is that you cannot find the power without giving to the restricted words of the section which he commented on a very much larger meaning than they fairly bear. That really is the criticism on the judgment by the Court of Queen's Bench, or at least by three of the Judges of that Court.

But if you once arrive at the same conclusion as the Vice-Chancellor did as to the true construction of the section, that there was the power to abate nuisances generally, and the duty to prevent it, I think his reasoning is—as he says it is—exactly in accordance with *Bright* v. *North*. He says (4): "It seems to me very strange to say, if it be a corporate duty to prevent nuisances, and to prevent them by bye-laws, yet, if an enormous and gigantic nuisance was about to be perpetrated, and the corporation were to take steps, by applying to this Court through the medium of the Attorney-General, for an injunction to restrain such nuisance, that they would not be allowed the costs of such a proceeding." And then he goes on, in reference to the nuisance of abstracting 800,000 gallons of water a day from the town—"it would be a very strange thing to say, in the case of a continued nuisance of

(1) Law Rep. 6 Q. B. 652.
(2) Kay, 268; 5 D. M. & G. 52. 18 Jur 289. 299
(3) 2 Ph. 216.
(4) Kay, 278. 18 Jur 240

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that description, although the corporation are under at least a moral obligation to protect the town from all petty nuisances, yet that they shall not lay out a farthing to prevent a large nuisance like that to all the inhabitants of the borough;" and so, I think, it would—that is, if the Vice-Chancellor's construction of the previous portions of the Act of Parliament could be supported. Then, as he says, it is a case of duty which is interfered with by the proposed legislation; it is a case, in effect, of attempted deprivation of the corporation of a part of their powers and duties, and they ought to be entitled to prevent it.

I am quite aware that in looking at the report of the case on appeal (1) the correctness of the Vice-Chancellor's reasoning appears to be by no means so clear. The Lord Justice *Knight Bruce* says (2): "The costs in question were incurred by measures which (in effect merely defensive) were taken by the corporation of *Wigan*, not unsuccessfully nor uselessly for the purpose of preventing or diminishing the mischief to the town of *Wigan*, that certain intended proceedings (reasonably considered as likely to interfere materially with its drainage, and so to render the air less pure, and cause general inconvenience there) were, not without probable grounds, thought likely to occasion mischief, which (not solely of a public nature) might well have been expected to be also prejudicial to property belonging to the corporation."

Now although there is no statement in the report of the case in *Kay's* Reports of any injury being alleged by the bill, I see it was alleged in the argument before the Vice-Chancellor that the corporation possessed houses and property within the borough likely to be injured; and I gather from this that Lord Justice *Knight Bruce* was not satisfied with the reason of the Vice-Chancellor as to there being a general duty to prevent nuisance imposed on the corporation, and that he took hold of this, which does not appear from the report to have been alleged in the bill, that there was a probability of injuring property. Certainly the judgment proceeds on no other ground; and the same remark may be made as to the shorter but by no means less clear judgment of Lord Justice *Turner*, who says (3), "The *Municipal Corporations Act* contains no

(1) 5 D. M. & G. 52. 16 Jur 299 (2) 5 D. M. & G. 54. 16 Jur 300
(3) 5 D. M. & G. 55. 16 Jur 301

express provision authorizing the application of the funds of corporations to the payment of expenses incidental to the protection of the corporate property. That has been left to the general law, which sanctions such expenditure, if reasonably and properly incurred." He takes the other view, that is, that the Act is silent, but leaves the general law to take effect, not limiting it to the words "necessary expenditure." He goes on, "The expenditure here in question was, as it seems to me, incurred *bonâ fide* for the protection of the corporate property, and my present impression is, that it was reasonably and properly incurred."

Therefore the judgment in the Appeal Court proceeds simply on the protection of the corporate property: it does not, so far as I can gather, in the slightest degree touch the judgment in the Court below so far as regards the latter portion of it; but I think the Appeal Court doubted whether the former part of it, namely, the proposition that it was a duty of the corporation to restrain nuisances generally, could be supported. Therefore they confined their judgment to the question of property.

It seems to me, therefore, looking at the authorities, that whether we take the one view or the other—whether we consider that under the words "expenses necessarily incurred," or similar words, used in the Act, this incidental expenditure is included; or whether we consider that the general law as to the rights of trustees defending their property and privileges remains unaffected—in either way, if there is an attack by proposed private legislation on the rights, privileges, and duties of a corporation, that corporation is entitled to defend itself before Parliament.

Now, before concluding what I have to say as to the law, I should like to say a word or two as to the recent Act of Parliament, the *Municipal Corporations* (*Borough Funds*) *Act*, 1872.

As I read that Act of Parliament, it very much increases the responsibility of corporations who choose to act in opposing bills in Parliament without obtaining the sanction of the ratepayers; because, if unsuccessful, it will be more difficult for them now than it was formerly to shew that the expenses ought to have been allowed, inasmuch as they could readily have obtained the sanction which would have protected them from all consequences of want of success.

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But still I must read the Act as I find it; and I find in the 8th section of the Act these words, "Nothing in this Act shall extend or be construed to alter or affect any special provision"—and so forth—"or to take away or diminish any rights or powers now possessed or enjoyed by any governing body, or which are or shall be vested in or exerciseable by the inhabitants of any district under any general or special Act." The result therefore is, that if the municipal corporation had a power prior to the passing of this Act to oppose this bill in Parliament, that power is certainly not—to use the words of the Act—"taken away or diminished" by the recent statute.

I now come to the circumstances of the case, and I must say I think it a very strong case, and quite distinguishable from all the cases to which I have been referred; because in this case the corporation had a special series of powers and duties, which were very much interfered with by the bill in question. It is only necessary to say a few words as to the history of the market company and the corporation.

It appears that in 1838 an Act of Parliament was passed empowering the corporation to buy lands in the borough of *Brecon*, and to make markets, and giving them all sorts of authorities and so forth. Then, notwithstanding the power so conferred on the corporation, the market was not made, or not satisfactorily made, and in 1862 an Act of Parliament was obtained by a company, authorizing the company, instead of the corporation, to provide a new market-place, and transferring the market-place and property which the old corporation acquired under the Act of 1838, or otherwise, to the company. Then the markets and fairs and the market-house, market-places, and all the works connected with it, are by the 21st section vested in the company: that is, they are taken away from the corporation. Then certain powers are given to the corporation, which appear to me very important.

By the 43rd section the sum of £210 a year is by the Act charged on the market-places and the tolls in favour of the corporation, and then by a subsequent section of the Act, sect. 65, the company is empowered "with, but not without, the consent of the corporation," to provide and maintain slaughter-houses: and then by the 80th section, the company are not at any time to lower,

raise, or alter any of the tolls "without in every case the consent of the corporation."

By the 82nd section the company has power to let the markets for three years only. Then the 89th section provides that the company and the corporation may from time to time enter into and carry into effect all such contracts with respect to any of the purposes of the Act, and in accordance with the provisions thereof, as they respectively think fit. Then the 90th section saves the rights of the corporation, except where they are expressly taken away.

Well, now, in that position of matters the corporation had both rights and duties; for instance, it was an important power of the corporation that they had a veto on the erection of slaughter-houses. Slaughter-houses are not agreeable things as a general rule, and no doubt it was considered not desirable to vest in a private company the right to put slaughter-houses anywhere they pleased in the town of *Brecon*. Again, the power of altering the tolls and rates is a very important power as regards the regulation of a market, and that again was not left to the company, but a control was given to the Corporation of *Brecon*.

Under those circumstances, the company, not having the power to use slaughter-houses without the assent of the corporation, erected them, and then the corporation refused its assent to the use of the slaughter-houses; and to obtain, amongst other things, the right to use the slaughter-houses they had erected, the company presented a bill to Parliament; and this bill, which went in the usual way before the Local Government Board in the first instance, contained, amongst other clauses, a power to use the slaughter-houses already erected without any consent on the part of the corporation.

Then the bill also proposed that the company should have power to lease the market for ten years instead of three; and it also proposed that they should have power to lower the tolls without the assent of the corporation. Lastly, it proposed that they should be empowered to sell the property of the company to the corporation: and that the corporation should have borrowing powers conferred on it to raise the money to pay for the property.

This bill the corporation opposed, and not altogether unsuccess-

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fully; because, as regards the slaughter-houses, it was ultimately amended by directing that the slaughter-houses should be constructed according to plans to be approved of by the Local Government Board.

So that, instead of giving the company power to use the slaughter-houses, effect was given to the objection of the corporation that they were not fit for use—for the committee that passed the amendment must have come to that conclusion on the evidence—that they were not fit to be used in their existing condition. That appears to me to have been a very important success—so important that it does not matter whether the corporation did or did not succeed on all of the grounds of their opposition; for on some of the other points they were not so successful.

That being so, is it to be tolerated that an individual, or a private company, shall take away from a corporation the right conferred on it by a private Act of Parliament to object to the user of slaughter-houses which the corporation considers unfit or improper for use, and shall say to the corporation, "You shall not be entitled to oppose my bill in Parliament; I will pass it in spite of you behind your back"? I think such a decision would be perfectly irrational. Such a privilege is a valuable privilege conferred on a corporation.

Then there is a minor point, but still it is a point of some importance. The corporation has a security on the market rates, amongst other things, for £210 a year. It is a small sum, no doubt; but the corporation has a right to say, You shall not lower the market rates without our consent. Is an individual, or a private company, to take the right to lower the market rates, which may actually diminish the property of the corporation in the £210? Though that is a very small point, it may be a material point.

As regards the keeping up of the market and the welfare of the inhabitants of the town, it by no means follows that lowering the market rates may be beneficial to the town. It may so lower the interest of the company as to prevent the markets being kept in an efficient state; and it appears to me that the privilege or right of the corporation to assent to the lowering of the rates is one which ought not to be interfered with by any individual or any

company without the corporation having the option of opposing it in Parliament.

Then we come to the third ground, which appears to me very important, namely, that the general power of contracting given by the first Act is limited to the purposes of that Act.

We have now a new company imposed on the corporation, and a power to buy on the terms fixed by the Act, and a power to borrow the money to complete the purchase. I know that is an option, but it is a very serious option. Is not the corporation to be heard as to the reasonableness of the terms? If it is not to be heard this might happen: it might become very desirable to purchase, and although the terms are not fair terms, the corporation, having no other means of purchasing, might be obliged to purchase on those terms. But if the corporation can be heard before the Committee of the House of Commons or House of Lords, they may then insist on the terms being fair: they may say, Give us the power, but give it us on fair terms. It seems to me to be the very heart of the interest of a corporation, if I may say so, that as to the terms of purchase they should be entitled to be represented. It is such an interference with a corporation, *quâ* corporation, both as regards its rights and duties, and as regards its property, that I cannot imagine it can be fairly said it is not connected with the purposes for which the corporation exists.

I say nothing about the ten years instead of the three: that is a very small point.

I think I have said enough to shew that this is the kind of active interference with the corporation itself, and with its rights, duties, and property, which entirely puts the case out of the class of cases I have been considering. It really comes much closer to the other class of cases, namely, where an action is brought against the corporation to recover from it a part of its property, or to deprive it of a part of its privileges.

It appears to me that, rightly considered, the corporation has by law the right to apply its funds in opposing such a bill as this, and that therefore the information fails, and must be dismissed.

I ought to have noticed before an argument addressed to me about the assent of the ratepayers. I did not notice it for this

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reason: it is said a majority of the ratepayers were in favour of the bill. That may have been so; but the corporation is governed by its town council, which is a representative body of all the ratepayers; and I am not aware of any means by which the town council can be controlled by the ratepayers except by the system of not re-electing them when the time comes round; which system is very likely to be enforced in the present instance if it should turn out that the town council have not acted in accordance with the views of the ratepayers.

Solicitors: *Wilkins, Blyth, & Fanshawe*, agents for *Cobb & Tudor, Brecon; Geare & Son*, agents for *J. Williams, Brecon.*

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## *In re* BATTERSBY'S TRUSTS.

*Practice—Trustee Relief Act—Payment out of Court—Numerous Parties interested—Service on absent Parties—Form of Order.*

On a petition under the *Trustee Relief Act* for payment out of Court of a fund to which numerous parties were entitled, most of whom were not before the Court, a former order having been made directing class inquiries, and the Chief Clerk having made his certificate, it was ordered that the Petitioner be at liberty to serve a copy of the petition, the former order, and the Chief Clerk's certificate, together with the present order, upon the several persons named in the certificate, and that the petition stand over till such persons had been served.

Statement.

THIS was a petition under the *Trustee Relief Act* for payment of two equal tenth parts of a fund in Court which represented the proceeds of the sale and conversion of the testator's estate, and which, under his will, was divisible into ten equal parts; also for the remaining eight of such tenth parts to be carried over to the proper separate accounts; and that the proper inquiries might be directed to ascertain the persons entitled thereto respectively. The title to two tenths was clear, but the title to the remaining eight tenths could not be determined until certain class inquiries had been made. The person entitled to the two tenths claimed to be entitled to a further share in the remaining eight tenths.

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By an order made on the 8th of August, 1877, certain sums were ordered to be paid out of Court on account of the two tenths, and certain class inquiries were directed, and the rest of the petition was ordered to stand over.

On the 8th of August, 1878, the Chief Clerk having made his certificate, the petition again came on.

Argument.

*Chitty*, Q.C., and *Cozens-Hardy*, for the Petitioner, claimed a further share of the fund in Court, but pointed out that the persons named in the Chief Clerk's certificate, who were fifteen in number, and who were interested in arguing the question, were not before the Court. The Rules and Orders contained no provision for service of an order made under the *Trustee Relief Act*; and the Chief Clerk declined to direct service. Unless they could be made Respondents to this petition, there was no way in which they could be brought before the Court.

*Davey*, Q.C., and *Renshaw*; *F. Thompson*, and *Woodroffe*, for the Respondents.

Judgment.

JESSEL, M.R., ordered that the petition do stand over till the first petition day in Michaelmas Sittings, and that the Petitioner be at liberty to serve a copy of the petition, the said order of the 8th of August, 1877, and the Chief Clerk's certificate, together with a copy of the present order, upon the persons named in the Chief Clerk's certificate.

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The parties served were represented by counsel, and the rights of the Petitioner and the Respondents and the parties served were declared by the Court.

Solicitors: *Sharpe, Parkers, & Co.*; *Shaw & Tremellen.*

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Dec. 6.

## *In re* SPURWAY'S SETTLED ESTATES.

*Settled Estates Act*, 1877, (40 & 41 *Vict. c.* 18)—*Petition for Sale—Opposition of contingent Remainderman.*

Testator, being entitled in fee to a settled estate, subject to a shifting clause in favour of *A.* in the event of testator's children dying without issue under twenty-one, and being also seised in fee of another property adjoining and partly intermingled with the settled estate, devised all his real estate to trustees in trust for sale. Testator left four children, the eldest being twelve years old. The trustees presented a petition under the *Settled Estates Act*, 1877 (40 & 41 Vict. c. 18), for the sale of the two properties together and the apportionment of the purchase-money. *A.* opposed the sale:—

*Held*, that *A.'s* interest was too remote to be considered, and the Court being satisfied on the evidence that the proposed sale would be more advantageous than if the properties were sold separately, the same was ordered accordingly.

Statement.

THIS was a petition, under the *Settled Estates Act*, 1877, by the trustees of the will of *John Purlevant Spurway*.

The testator was entitled to a defeasible interest in an estate called the *Spring Grove* estate, consisting of a good-sized house, and nearly 165 acres, under the following title:—

By the will of *William Purlevant*, who died in 1840, certain powers of sale and exchange were given to his trustees, under which they purchased the said estate, and by an indenture of the 25th of March, 1846, the same was conveyed to the last-mentioned trustees to the uses and upon the trusts declared by *William Purlevant's* will, and stood limited after the decease of *Frances Spurway* (daughter of *W. Purlevant*) and her husband, to the use of all and such one exclusively of the children of *Frances Spurway* as she should by deed or will appoint, with a gift over in default of appointment.

In 1865 *Frances Spurway* died, leaving her husband and four children, namely, the said *John Purlevant Spurway*, *William Henry Spurway*, *Frederick Spurway*, and *Edward Spurway*, her surviving.

By her will, in exercise of her said power of appointment, she devised the *Spring Grove* estate (subject to the life of her husband) to the use of her son the said *John Purlevant Spurway* in fee, but if he should die without leaving any lawful issue, either

immediate or remote, living at her decease, or, leaving any such issue, if such issue should all die under the age of twenty-one years, and no one of them should have any lawful issue living at his or her decease, then to the uses therein declared in favour of her son *William Henry Spurway*, with remainder on certain events to the uses therein declared in favour of her son *Edward Spurway* in fee.

Statement.

On the death of the husband of *Frances Spurway*, in 1866, *John Purlevant Spurway* became entitled to and entered into possession of the *Spring Grove* estate.

*John Purlevant Spurway* was seised in fee of other freehold lands, consisting of about 300 acres, adjoining or intermingled with the lands of the *Spring Grove* estate; and in some places he had caused the hedges separating the lands to be removed, and the fields belonging absolutely to him to be thrown into one with the fields forming part of the *Spring Grove* estate.

*John Purlevant Spurway*, by his said will, dated the 12th of August, 1877, devised all his real estate to the present Petitioners upon trust for sale. He died on the 14th of August, 1877, leaving four children him surviving, namely, three boys and a girl, the eldest, a boy, being now twelve years old, and the youngest two years old.

The Petitioners alleged that it would be for the advantage not only of the persons interested under the will of *J. P. Spurway*, but of all other persons interested in the *Spring Grove* estate, that the same should be sold together with the lands to which *J. P. Spurway* was absolutely entitled, and that they would realize more if sold together than if sold separately, and prayed that the same might be so sold and the purchase-money apportioned.

The petition was served on *William Henry Spurway* and *Edward Spurway*.

Evidence was adduced on behalf of the Petitioners to shew that the value of the estate would be depreciated if the properties were sold separately, and contrary evidence was adduced on behalf of *William Henry Spurway*, who opposed the sale.

Argument.

*Davey*, Q.C., and *Whitehorne*, for the Petitioners, submitted, on the evidence, that it would be for the benefit of all persons

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interested in both properties if they were sold together, and the purchase-money apportioned.

Argument.

*Chitty*, Q.C., and *Dryden*, for *William Henry Spurway*:—

We submit that *William Henry Spurway*, being entitled to a contingent interest in the *Spring Grove* estate in the event of the four children of *John Purlevant Spurway* dying under twenty-one, and without leaving issue, he has a sufficient interest in the property to justify him in opposing the proposed sale. According to our evidence the properties would sell to more advantage separately. Besides, no adequate reason is assigned for the sale: it is a family mansion-house and estate which was occupied by the testator, and the Respondent would prefer its remaining unsold, as it may, possibly, devolve upon him. We submit his interest is not too remote, and that the estate should not be sold without his concurrence: *Ex parte Taylor* (1).

*Skinner*, for the other Respondents.

Judgment.

JESSEL, M.R.:—

The ground upon which I decide this petition is very simple—not that the opponent might not have had something to say if he had had sufficient interest to be considered—but that I think I may safely and properly disregard him.

There is no doubt that, according to the view of the Petitioners, and according to my own view, it is more advantageous to sell the two properties together than to sell either of them alone; and, therefore, if I regard the evidence of those who are represented by the Petitioners, it is obvious to my mind that it is more advantageous to sell as they ask, namely, as an entire estate. If the properties are sold separately, then you have a large house or mansion with only 165 acres of land. The testator occupied with that land about 300 acres more, making nearly 500 acres. If I sell a good house—or mansion if you like—and nearly 500 acres of land, I sell a very eligible residential property. If I sell such a house—the larger it is the worse for this purpose—with only 165 acres, and sell away the other land, it appears to me it is not so likely to

(1) 1 Ch. D. 426.

obtain an advantageous price. In my opinion it is very beneficial to the owners of the fee simple to sell the two together. Of course I can arrange an apportionment of the price by a reference to Chambers. It is suggested that it is a family mansion, but in fact it is not. The whole property consists of a house and 165 acres, which were purchased in the year 1846, so that the whole is not sufficiently large to entitle it to be called a family mansion in the sense that there is anything in the shape of *pretium affectionis* at all. It is quite out of the question. It is nothing more than a residence which one or two members of the family want.

Then the next objection is that the contingent remainderman says he should like to keep it. No doubt his views and wishes are to be attended to in a proper case, but the answer is, that this is not a proper case. His interest is so remote that the Court ought not, in dealing with this property, to regard his views and wishes to the detriment of the Petitioners, who have a substantial interest in the property. How does it stand? It belonged to the testator in fee simple, subject to a gift over if he died without leaving issue living at his death, which has not happened, or leaving any such issue they should all die under twenty-one, and no one of them should leave any lawful issue living at his or her death. What is the present state of the family? He has left four children, three boys and a girl; the eldest is a boy twelve years old, and the youngest is two years old. It is a shocking thing to contemplate that all these four should die under twenty-one. There is, besides, the possibility of the girl marrying and dying under twenty-one and leaving a child. It is not impossible, of course, but very remote, in my opinion—far too remote for me to consider the interests of the remainderman as substantial for the present purpose.

I had a case of this kind before me some time ago, in which I also made an order. That was a case of strict settlement. In my opinion there is no difference between this and a case of strict settlement. As far as the interests of the remainderman are concerned, his chance of getting possession is exactly the same. In that case there were four tenants for life with remainder to their children in tail, and in default of issue, over. The position of the tenant in remainder would certainly not be better than this one.

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In my opinion there is no substantial distinction. It does not matter whether a gift is on the dropping of four lives without any leaving issue living at their death, or on the dropping of four lives with failure of their issue. Therefore I look upon this Respondent as strictly in remainder. That being so, I think I may safely and properly disregard his interests, and make the order as asked.

The question of apportionment will go to Chambers. The Respondent will have liberty to attend in Chambers: the apportioned price of the settled property to be paid into Court.

Solicitors: *Robinson, Preston, & Stow; Kingsford, Dorman, & Kingsford.*

## HIGGINSON *v.* HALL.

V.-C. M.
1879
Jan. 11.

[1878 H. 271.]

*Practice—Affidavit of Documents—Next Friend—Rules of Court*, 1875, *Order* XXXI., *r.* 12.

Where a Plaintiff of unsound mind sues by a next friend, the Defendant is entitled to an affidavit of documents made by the next friend or by some one acquainted with the facts.

Statement.

THIS was an action by *Mary Higginson*, a person of unsound mind, suing by *James Morris*, her next friend, against *Joseph Hall*; in which the Plaintiff alleged that she had placed considerable sums of money in the hands of the Defendant, and claimed an account and payment of the amount found due. The Defendant delivered a statement of defence denying many of the allegations in the statement of claim, and denying that anything was due from him. The Defendant applied by summons for discovery of documents by the next friend, but the summons was dismissed in Chambers.

The Defendant now moved that *James Morris*, the next friend of the Plaintiff, might be ordered to make and file a full affidavit stating whether the Plaintiff had or had had in her possession or power any and what documents relating to the matters in question in this action, and accounting for the same; and that all further proceedings in this action might be stayed until the next friend had made the affidavit.

Argument.

*Bristowe*, Q.C., and *Cozens-Hardy*, for the Defendant:—

A Defendant has a right to know what documents the Plaintiff has, and cannot lose that right because the Plaintiff happens to be of unsound mind. *Hardwick* v *Wright* (1) seems against the Defendant, but there the alternative of a stay of proceedings was not asked for. Where a Plaintiff cannot make an affidavit, the proper course is to stay proceedings until some competent person has made the affidavit: *Prioleau* v. *United States of America* (2);

(1) 11 Jur. (N.S.) 297. (2) Law Rep. 2 Eq. 659.

V.-C. M. 1879 — HIGGINSON v. HALL. — Argument.

*United States of America* v. *Wagner* (1); *Princess of Wales* v. *Earl of Liverpool* (2); *Republic of Liberia* v. *Roye* (3). The next friend has chosen to institute these proceedings, and why should he not make an affidavit?

*Glasse*, Q.C., and *Field*, for the Plaintiff, did not dispute that there must be an affidavit of documents, but who was to make it, and could the Court make the order? Order XXXI., rule 12, only mentions a "party," and a next friend is not a party.

Judgment.

MALINS, V.C., said that he should decide on broad principles that the Defendant was entitled to an affidavit of documents by the next friend, or by some one on behalf of the Plaintiff, in the same manner as was done in *Republic of Liberia* v. *Roye*; and made an order that the next friend should make an affidavit of documents. The costs of the application to be costs in the action.

Solicitors: *Field, Roscoe, & Co.*; *Sharpe, Parkers, & Co.*

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V.-C. M. 1878 — *Nov.* 19, 25.

## ELLIS *v.* HOUSTOUN.

[1878 E. 212.]

*Will—Construction—All the Children of A. and B.—Exclusion of illegitimate Children.*

15 Ch D. 201
204
7 Ch D. 384
49 L J 697

A testatrix gave a sum of stock to trustees to pay the dividends to her brother *Charles* and his wife *Elizabeth* for their lives, and after the decease of the survivor, the capital to be divided between all the children of her brother. The brother had three children by his first wife, two children by his second wife *Elizabeth* before marriage, and one child after marriage, which were facts well known to the testatrix, who promised, as the claim alleged, that if he married his wife *Elizabeth* she would provide for all his children by her, and she in fact treated all the children equally as her nephews and nieces, and it was further alleged that the testatrix gave instructions that her will should be so drawn as to provide equally for both classes of

(1) Law Rep. 2 Ch. 582. (2) 1 Sw. 114.
(3) 1 App. Cas. 139.

children, and that she believed such to be the effect of the words of the will:—

*Held*, upon demurrer, that the illegitimate children must be excluded from the bequest; and that the words of the will being distinct, no extrinsic evidence could be received to shew what the intention of the testatrix was.

*Laker* v. *Hordern* (1) commented upon.

Statement.

THIS case came on upon demurrer. The allegations in the statement of claim were as follows:—

The testatrix made her will on the 21st of August, 1856, and thereby bequeathed a sum of £26,977 £3 per Cent. Consols to trustees upon trust "to pay to or permit and suffer my brother *Charles Streater Ellis* to receive the interest, dividends, and annual income thereof, for and during the term of his natural life, and after his decease to pay to or permit and suffer *Elizabeth Ellis*, wife of the said *Charles Streater Ellis*, to receive the interest, dividends, and annual income for and during the term of her natural life, and after the decease of the survivor of them the said *Charles Streater Ellis* and *Elizabeth* his wife, to pay, assign, and transfer the said sum of £26,977 £3 per Cent. Consols, and the interest, dividends, and annual income thereof respectively, unto and equally between and amongst all and every the children of the said *Charles Streater Ellis* who shall be living at the death of the survivor of them the said *Charles Streater Ellis* and *Elizabeth* his wife, and the issue of such of them as shall be then dead."

The testatrix died possessed of considerable property in the year 1868. *Charles Ellis* was married twice. By his first marriage he had three children; he was secondly married to *Elizabeth Ellis* in March, 1857, but previously to their marriage they had lived together as husband and wife, and had two children, viz., the Plaintiff *Frederick Ellis*, who was born in 1832, and *James Ellis*, who was born in 1837. The claim stated that the Plaintiff and his brother *James* were always recognised by their father as his children, and they were baptized as such. The testatrix was always on the most affectionate terms with her brother *Charles Ellis*, and she made him a yearly allowance, but she very strongly remonstrated with him on the impropriety of his conduct in living with *Elizabeth Ellis* without being married to her, and she finally refused to further communicate with him

(1) 1 Ch. D. 644.

V.-C. M. 1878 ELLIS v. HOUSTOUN. Statement.

unless he married *Elizabeth Ellis*. She told him, however, that if he did marry she would provide for his children by *Elizabeth Ellis*. Thereupon the marriage took place between *Charles Ellis* and *Elizabeth Ellis*, and they had one more child who was born in December, 1857. The testatrix thenceforward continued on the most intimate and affectionate terms with *Charles Ellis*, and the two illegitimate children, who were treated by her as being her actual and legal nephews. She very frequently invited them to her house, and made no distinction between them and her lawful nephews and nieces, and spoke of herself as their aunt, and of them as her nephews. Previously to her will she constantly stated and promised to *Charles Ellis* and to the Plaintiff that she should provide by her will for the Plaintiff and his brother *James Ellis*, and subsequently to her will she repeatedly, down to the time of her death, told *Charles Ellis* and the Plaintiff that by her will she had provided for the Plaintiff and *James Ellis*, and had made no distinction between them and their brother and sisters. The testatrix, when she made her will, intended thereby to provide for the Plaintiff and *James Ellis*, and gave instructions to that effect, and fully understood that the language in which the bequest was expressed was sufficient to identify the Plaintiff and his brother, and to include them among the children of *Charles* and *Elizabeth Ellis*. *Louisa Ellis*, one of the legitimate children of *Charles Ellis*, married Mr. *A. Blake*, a brother of the Defendant *Frederick J. Blake*, one of the executors of the will, who was a member of the firm of *Wordsworth, Blake, & Co.*, the solicitors of the testatrix, who prepared her said will.

*Elizabeth Ellis* died some years since, and *Charles Ellis* died in August, 1878.

The Plaintiff claimed that the trusts of the will as to the £26,977 might be declared and carried into effect by the Court, and that the Plaintiff might be declared entitled to one-sixth part of the said legacy.

Argument.

*J. Pearson*, Q.C., and *Decimus Sturges*, in support of the demurrer:—

This case is entirely governed by *Dorin* v. *Dorin* (1). The

(1) Law Rep. 7 H. L. 568.

circumstances of that case were much stronger than they are here, because the testator there made his will the day after his marriage, and gave his property to his wife for life and then to his children by his wife, he had had two illegitimate children by her who were baptized in his name, and there never were any other children after the marriage. That case distinctly laid down the rule that where there are, or may be, legitimate children to answer the description, illegitimate children cannot take. The words of this will are distinct, and no evidence of surrounding circumstances can be admitted to explain them. *Dorin* v. *Dorin* (1) was followed by Vice-Chancellor *Hall* in *In re Ayles' Trusts* (2), which was a strong case in favour of the illegitimate children.

*Higgins*, Q.C., and *S. Brice*, for the Plaintiff:—

The circumstances here are all in favour of the testatrix's intention being to include the illegitimate children, and it is alleged that the testatrix believed when she made her will that the words were sufficient to carry out that intention. It is alleged that the marriage of Mr. and Mrs. *Ellis* took place in consequence of the promise by the testatrix that if they did marry she would provide for the children of her brother by *Elizabeth Ellis*. Under these circumstances, the Court will admit extrinsic evidence to shew that the testatrix intended to include the two illegitimate children. In *Crook* v. *Hill* (3) Lord Justice *Mellish* said it was clearly settled by authority that the word "children" might by force of the context carry the property to a class including both legitimate and illegitimate children. We therefore ask the Court to take into consideration the surrounding circumstances to shew what the intention was. In the case of *Laker* v. *Hordern* (4), where the bequest was to "all and every my daughters," Vice-Chancellor *Bacon* there held that the illegitimate children of the testator took the legacy, although at the time the testator was married and might have had legitimate children to answer the description. His Lordship there admitted evidence as to the surrounding circumstances, and he said that *Dorin* v. *Dorin* had no application where it was necessary to have recourse to extraneous evidence.

(1) Law Rep. 7 H. L. 568.
(2) 1 Ch. D. 282.
(3) Law Rep. 6 Ch. 311.
(4) 1 Ch. D. 644.

V.-C. M. 1878 ELLIS v. HOUSTOUN. Argument.

In that case *Wilkinson* v. *Adam* (1) was strongly relied on. In *Grant* v. *Grant* (2) evidence was admitted to shew the meaning of the testator. There Mr. Justice *Blackburn* said: "The Court in construing the language of a testator may properly take into account all that he knew at the time, in order to see in what sense the words were used."

Then with regard to the testatrix believing that she had given the property to the Plaintiff and his brother, it must be recollected that the will was prepared by a relative of a person who would benefit by the illegitimate children being excluded, and there are cases to shew that it is the duty of a solicitor under such circumstances to shew that the testatrix fully understood the effect of what she was doing: *Bulkeley* v. *Wilford* (3); *Segrave* v. *Kirwan* (4); *Allen* v. *Macpherson* (5); *Kennell* v. *Abbott* (6); *Kerrick* v. *Bransby* (7); *Marriott* v. *Marriott* (8); *Fulton* v. *Andrews* (9).

*Everitt*, in support of a second demurrer by another Defendant.

Judgment.

MALINS, V.C.:—

I am clearly of opinion that I must allow this demurrer. Upon the statements in the claim nothing can be more clear than that it was the intention of this testatrix that after the death of her brother and his wife, each of whom are made tenants for life, that all the brother's children—that is, all the children by the first wife who were legitimate—and all the children by the second wife, whether legitimate or illegitimate, were to be the objects of her bounty and were to take. That that was the case, the circumstances admit of no doubt whatever. One cannot help regretting that where money is concerned it is so much the rule to overlook moral obligations. I take the same view of this case as Lord *Loughborough* did in the case of *Cartwright* v. *Vawdry* (10), which, if possible, was a much harder case than this; for there the testator left the property equally amongst his children. He had four daughters, and nobody knew that one of them was illegitimate.

(1) 1 V. & B. 422.
(2) Law Rep. 5 C. P. 727.
(3) 2 Cl. & F. 102.
(4) 1 Beatt. 157.
(5) 1 Ph. 133.
(6) 4 Ves. 802.
(7) 7 Bro. P. C. 437.
(8) 1 Str. 666.
(9) Law Rep. 7 H. L. 448.
(10) 5 Ves. 530.

She lived with him just as one of his daughters; he treated her as his daughter, and he intended her to take; but it turned out that she was illegitimate, whilst her three sisters were legitimate. The question there was whether under the description "children" the illegitimate daughter could take. Lord *Loughborough*, then Lord Chancellor, says: "This is a very unfortunate case. I have no doubt of the intention, but how can I possibly put upon the will the construction the Plaintiff desires, when there are lawful children? The family will act very honourably and conscientiously by giving way to the disposition which is stated; but it is impossible in a Court of Justice to hold that an illegitimate child can take equally with lawful children upon a devise to children. Mr. *Vawdry's* evidence increases the regret. When the testator placed such confidence in him, it was very wrong not to follow his advice. If he had named this daughter, it would have done."

Indeed, if the doctrine which has been urged upon me on behalf of the Plaintiff were to be acceded to, it would be impossible for any family upon the death of a testator to know what their rights were; for there would have to be an inquiry whether he did intend illegitimate children to take, and how many illegitimate children he had. Who is to ascertain that? You would have to go into an inquiry to ascertain whether he meant illegitimate or legitimate children.

Now, I may say I believe the law is firmly settled, and was settled long before any of us came into existence, that where you have a bequest of property to a class of persons, children, nephews, or nieces, or any class you like—"I give to my children," "I give to my nephews and nieces," or "I give to my brothers and sisters," and you find in the class designated legitimate members—you never can admit illegitimate persons to share with them. Therefore in all cases where a man says, "I give to *A.* for life and after his decease to his children," if there are legitimate children to be found answering that description you cannot go any further, and you cannot admit illegitimate children to share with them; and that case of *Cartwright* v. *Vawdry* (1) is the recognised authority, and has been acted upon ever since; and indeed the same principle was acted upon long before that case.

(1) 5 Ves. 530.

V.-C. M. 1878 ELLIS v. HOUSTOUN. Judgment.

Then it is suggested that I am not to read this will as I find it; that the will was not prepared by the testatrix, but by somebody else, and that therefore I am to hear what that somebody else says was the intention of the testatrix, instead of looking at the will itself. The law is so clear that it does not admit of any such contention. I must look at the will itself; I cannot go from the words which are used in the will. We can never go behind a will to construe it. The words to be found in the will, whoever prepared it, became the words of the testatrix as soon as she executed the will. Therefore how can I go into an inquiry to see what this lady intended by "children"? Suppose—to put the illustration which Mr. *Brice* gave—a man says, "I give my property to my son *John*," and there is another son, *William*, and it is beyond all possibility of doubt that he did not intend *John* to take, you cannot allow *William* to take, because there is a son *John* who answers the description; but if he says, "I give to my son *John*," and there is no son *John*, then that ambiguity is explained away by parol evidence. Upon the same principle a gift to a child is not a gift to an illegitimate child in the eyes of the law; and therefore when you find a person who does strictly answer the description in the will, you do not try to find out anybody else who does not answer the description, because, directly you find persons answering the description, the words are satisfied, and you require no parol evidence to see what was intended. If that were admitted no man would be safe in making his will.

Now it has been urged upon me that *Dorin* v. *Dorin* (1) did not decide what it did decide. In *Dorin* v. *Dorin* there was no legitimate child, and in *Crook* v. *Hill* (2) there was no legitimate child. In the case before Vice-Chancellor *Bacon*, *Laker* v. *Hordern* (3), where the testator gave his property to his daughters, there were illegitimate and no legitimate daughters. I challenged the Plaintiff's counsel to give me any case, from the earliest to the latest period, in which, where there are legitimate children, illegitimate children have been allowed to answer the description of children. No such case has been produced, because there is no such case to be found. Now what was really decided in *Dorin* v. *Dorin*? That case was

(1) Law Rep. 7 H. L. 568. (2) Law Rep. 6 Ch. 311.
(3) 1 Ch. D. 644.

V.-C. M. 1878 ELLIS v. HOUSTOUN. Judgment.

argued before me, and I gave judgment upon it. There I thought myself fully warranted, upon the authorities, in coming to the conclusion I did, because there was no legitimate child to answer the description in the will at the death of the testator, and there were two illegitimate sons who had been brought up by the testator as his own children, just as if they had been born in wedlock and he had them baptized by his name, and had told the Roman Catholic priest that they were his children; yet, because the testator had married the mother of those children the day before his will was made, the House of Lords came to a conclusion against the illegitimate children; and for what reason? Because, a marriage having taken place, it was possible that legitimate children might be born to answer the description; and therefore, when there are or may be legitimate children to answer the description, illegitimate children will not take. That was carrying the doctrine, I think, further than it has ever been carried before. I can only say, in common with most persons, that it is a result which anybody may regret; Mr. *Pearson*, who argued the case, admits that he never had a shadow of doubt that illegitimate children were intended, and yet it is the rule of law that you cannot let illegitimate children take where there are or may be legitimate children, and therefore illegitimate children are excluded.

Then there is the case of *Crook* v. *Hill* (1); that case was very much relied upon. There there were no legitimate children to answer the description. The circumstances were peculiar. The testator had two daughters, one of whom had been the wife of *Crook*. She died, and the husband then married his late wife's sister, that is, another daughter of the testator, with his approbation. By his will the testator called *Crook*, who had married the two daughters in succession, his son-in-law. No doubt he was the testator's son-in-law, because he legitimately and properly married his first daughter; but the Court of Appeal and the House of Lords came to the conclusion that, under the extraordinary circumstances of that case, there being no legitimate child to answer the description (and I am perfectly satisfied that if there had been a legitimate child to answer the description the illegitimate children would have been excluded), the Court was warranted, under all the exist-

(1) Law Rep. 6 Ch. 311; Ibid. 6 H. L. 265.

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ing circumstances, in ascertaining what was intended. Therefore that was a case in which the illegitimate children took, because there was no legitimate child to answer the description.

Then, again, there is a case which was before Vice-Chancellor *Hall*, *In re Ayles' Trusts* (1), which is the same as *Dorin* v. *Dorin* (2). That is a remarkable case, and the Vice-Chancellor, in my opinion, most properly held that inasmuch as there was a legitimate child to answer the description, illegitimate children could not take.

In the case of *Laker* v. *Hordern* (3), which has been much pressed upon me, the testator gave his property to his daughters, and there were none except illegitimate daughters. That was a case in which there were no legitimate children to answer the description, and therefore Vice-Chancellor *Bacon*, in some way or other (I do not exactly understand how), got over *Dorin* v. *Dorin*, although it was strongly pressed upon him. There the testator was married, and the gift was, "I give to my daughters," and according to *Dorin* v. *Dorin*, inasmuch as he might by possibility have had legitimate daughters who would take, it might very well have been decided that illegitimate children were excluded; but, however, I am very glad Vice-Chancellor *Bacon* was able to satisfy himself that in that particular case he could decide in favour of the illegitimate daughters, because that effected the intention of the testator. As far as I know, there was no appeal, because the good sense and good feeling of the parties allowed them to acquiesce in the daughters' taking, and they were evidently intended by the testator to do so. But I am bound to say that if that case had come before me, I should have come to an opposite decision, because when the circumstances are such as to shew that there are or may be legitimate children, then, according to *Dorin* v. *Dorin*, illegitimate children would be excluded.

Now I believe those are the only cases which have occurred in modern times on this subject; but it is urged that illegitimate children may in some cases take; and so they may, if in the will itself you find something to warrant their taking. If the testator says in his will, "I give a legacy to my son *A.* and afterwards to his children," and *A.* is illegitimate, is *A.* to take under a general

15 Ch D 204

(1) 1 Ch. D. 282. (2) Law Rep. 7 H. L. 568.
(3) 1 Ch. D. 644.

bequest to children? Certainly. Because the testator having called him a child in one part of the will, he is to be treated as such in another part of the will. In that case the will itself would enable the Court to give it to that illegitimate child.

So, in the case of *Gill* v. *Shelley* (1), a woman gave her property to the children of *Gill*, who had two children, one legitimate and one illegitimate, and it was there held that the gift to children took effect, because it would only satisfy the words in the plural by taking in the illegitimate child. Therefore, where, in consequence of some indication on the will, it is shewn that illegitimate children were intended by the testator to take, or where there are no legitimate children to answer the description, then you have recourse to parol evidence to shew what was meant, and possibly illegitimate children may take. But where there are legitimate children to take under such description, it is absolutely impossible to come to the conclusion that illegitimate children can take. So far, therefore, as this point is concerned, I must allow the demurrer, on the ground that the Plaintiff is one of the illegitimate children, and takes no interest under the will.

Then it is said there is another equity in this statement of claim, which is in these words: "that in accordance with the promises and representations made by the testatrix, she intended to provide for the Plaintiff and his brother, and gave instructions to that effect, and she fully understood that the language in which her will was expressed was sufficient to describe and identify the Plaintiff and *J. Ellis*, and to include them among the children of *Charles Ellis*, and that she died in that intention and belief." So that according to that I am not to look at what the will itself says, but I am to receive parol evidence to shew what the testatrix meant by the expression "children." If parol evidence on such a subject as that were admitted, parol evidence could be admitted on any subject. No will could ever be construed, and no one would know what the rights of the parties were under a will. In my opinion there is not a particle of equity in this statement of claim; and therefore I am bound to come to the conclusion which I do. I desire that there should be no doubt whatever on such a subject. I am quite sure that in *Dorin* v. *Dorin* (2) I should not have had any

(1) 2 Russ. & My. 336. (2) Law Rep. 7 H. L. 568.

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doubt if Mr. *Dorin* had had a child born after his marriage. It was only because there was no legitimate child to answer the description that I came to the conclusion I did; but that being overruled, I think, as far as I am concerned, the law must be considered as now thoroughly settled that in all bequests to classes of children, where there are two classes, you cannot admit parol evidence to let in illegitimate children to share in the estate.

*Pearson*, Q.C., asked for the costs.

MALINS, V.C.:—Upon the whole I think, considering the very great hardship of this case, and although the law is, in my opinion, perfectly clear, yet it is equally free from doubt that these children were intended to take, and I will not give any costs. I think they ought to come out of the estate, but that I have no power to order.

*Higgins*, Q.C., asked for leave to amend, not so far as the judgment proceeded on the case of *Dorin* v. *Dorin* (1), but because the Plaintiff might be able upon the second point to shew that there were communications which would tend to substantiate a trust. He referred to Order XXVIII., rule 12.

MALINS, V.C.:—Giving liberty to amend seems to imply some doubt, but if the rules now are that allowing a demurrer to an action is a bar to bringing another action, I will add the words "without prejudice to bringing another action." I allow the demurrer without costs, and as a matter of recommendation, I say that the costs should come out of the estate, but I have no control over the fund.

Solicitors: *E. Beall; Wordsworth, Blake, Harris, & Parson.*

(1) Law Rep. 7 H. L. 568.

## WELDON *v.* DICKS.

V.-C. M.

1878

[1877 W. 245.]

*Nov.* 26, 27; *Dec.* 2, 3.

*Copyright—Form of Registration—Copyright in "Title"—Right of Republication—Book out of Print—Acquiescence.*

In registering the copyright of a book at *Stationers' Hall* it is sufficient to enter the first publisher, under the trade name of the firm, and the actual proprietor of the copyright at the time of registration, without stating who the first proprietor was, or how the copyright devolved upon the present proprietor.

Copyright in the "title" of a book, as being a material portion of a work, will be protected, although another book published under a similar title may be totally different in form and contents.

The proprietor of a copyright does not lose his right of republication, although the book may have been out of print and obsolete, and of little or no value, for any number of years.

To sustain an allegation of acquiescence in the infringement of a copyright, it must be shewn that there was knowledge of the infringement.

Statement.

THE Plaintiff, *Christopher Edward Weldon*, and the Defendant, *John Dicks*, were book publishers. The Plaintiff stated by his claim that in the year 1847 a series of books entitled "*The Parlour Library*" were issued by Messrs. *Sims and MacIntyre*, who, as proprietors of the copyright, registered the series at *Stationers' Hall*, as required by the Act 5 & 6 Vict. c. 45. A great number of books or novels were published in that series, and No. 196 thereof was a book called "*Trial and Triumph.*" That book was first published on the 10th of July, 1854, by Messrs. *Newby & Co.*, who were the proprietors of the copyright thereof; and it was published in the *Parlour Library* on the 15th of June, 1860, by *John Maw Darton*, who had become and then was the proprietor of the copyright as well of the *Parlour Library* series as of the book called "*Trial and Triumph*," and the title thereof. By an indenture dated the 4th of May, 1876, the copyright in the *Parlour Library* series was assigned to the Plaintiff by *John Maw Darton*, and No. 196, being the book "*Trial and Triumph*," was included in that assignment, and an entry thereof had been made by the Plaintiff in the registry book at *Stationers' Hall*. The Plaintiff immediately after the assignment to him of the copy-

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right in the *Parlour Library* commenced to re-issue the series, and had published a new edition of eleven of the books in such series, and was preparing for publication a new edition of "*Trial and Triumph*," which would shortly be published by him at the price of 2*s*., and he had already expended considerable sums of money in advertising the series, and in preparing "*Trial and Triumph*" for publication. The Defendant had recently commenced to issue a series of books or novels under the general title of *Dick's English Novels*, and he had since the date of the assignment to the Plaintiff of the copyright in the *Parlour Library* published in such series a novel under the title of "*Trial and Triumph*" at the price of 6*d*. The Plaintiff alleged that the Defendant had continued to publish the last-mentioned work with the intention of inducing the public to believe, and he had in fact induced persons to believe, that the book so published by him was identical with that about to be re-published by the Plaintiff. And the Plaintiff claimed an injunction to restrain the Defendant from publishing or selling any book or publication with the title of "*Trial and Triumph*"; and an order for cancelling all plates used about any such publication; and for delivery up of all copies of the book already published by him under that title; and damages for infringement of the Plaintiff's copyright in the said title.

The Defendant by his statement of defence did not admit that the Plaintiff was now the proprietor of the copyright in the series of books called "*The Parlour Library*," or in the book called "*Trial and Triumph*," forming one of the said series, and he denied that there was or could be any copyright in the title thereof. With respect to his own work called "*Trial and Triumph*," the Defendant stated that in the year 1873 the Rev. *Henry V. Palmer* offered him the manuscript of an entirely original work in the form of a novel with the proposed title of "*True to the Core*," but before purchasing the work the Defendant discovered that the title "*True to the Core*" had already been used as the title of a drama, and he therefore requested the author to choose another title, and "*Trial and Triumph*" was then proposed by the author and adopted by the Defendant in entire ignorance that it had ever been used by any other person or applied to any other work.

On the 7th of July, 1875, the Defendant commenced the publication of that novel or story in a weekly magazine of general literature published by him under the title of "*Bow Bells.*" That magazine had an average circulation of about half a million copies. The publication of the story was completed in about four months. On the 27th of July the Defendant commenced the republication of the same story in a monthly magazine, also entitled "*Bow Bells,*" which had a circulation of 80,000 copies, and subsequently the Defendant republished the same story in a half-yearly volume of tales, being a collection of completed stories from "*Bow Bells.*"

On the 24th of April, 1877, the Defendant, for the first time, published the same story as a separate work, in a series which was being brought out by him under the title of "*Dicks' English Novels,*" at the price of 6*d.*, and with the name of the author printed on the outside sheet. The Defendant's work was entirely distinct in its plot and subject-matter from the book entitled "*Trial and Triumph*" to the copyright of which the Plaintiff claimed to be entitled, and was entirely different in form and appearance both from the said first publication, in the year 1854, of the Plaintiff's book, which was in fact then issued as a three-volume novel, and also from its present form. The Defendant denied any intention to induce the public to believe that his work was the same as that intended to be published by the Plaintiff, but he claimed to be entitled to use the said title "*Trial and Triumph,*" and to continue to publish and sell copies of the story under that title. Both before and after the date alleged by the Plaintiff as the time of the first publication of his book, more than one book was published by other persons under the same title or one substantially the same. For instance, in 1834, a book entitled "*Trials and Triumphs*" was published by *Smith, Elder, & Co.* In the year 1849 a book entitled "*Trials and Triumphs*" was published by *J. W. Grove,* and in the year 1865 a book styled "*Trial and Triumph*" was published by *E. C. Crocker.*

A preliminary objection was raised on behalf of the Defendant, that the Plaintiff had no right to sue because he had not fulfilled the requirements of the *Copyright Act* (5 & 6 Vict. c. 45), and had not entered the particulars of his publication in the form prescribed by the 13th section of the Act. The entry in the registry

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book of the *Stationers' Company* was in the following form :— "Time of making the entry, 14th of June, 1877. Title of book— '*Trial and Triumph.*' Name of the publisher and place of publication, *Newby & Co., Welbeck Street, Cavendish Square, London.* Name and place of abode of the proprietor of the copyright— *Christopher Edward Weldon.* Date of first publication—July 10, 1854."

Argument.

*Glasse*, Q.C., and *Byrne*, for the Plaintiff:—

First: The objection cannot now be taken to the title of the Plaintiff to sue, because the Defendant is bound, under the 16th section of the *Copyright Act* (5 & 6 Vict. c. 45), on pleading to an action, to give notice in writing to the Plaintiff of any objections on which he means to rely on the trial of such action, and if his objection be that the Plaintiff is not the proprietor of the copyright, then the Defendant must specify who is the person he alleges to be such proprietor, otherwise he shall not be at liberty to give evidence that the Plaintiff is not the proprietor. The burden is thrown upon the Defendant of giving notice of an objection to title. He has not complied with that section, and on that ground the objection fails. Secondly: The 13th section is fully complied with. The first publisher's name is given, which enables any person to ascertain the correctness of the entry, and the name of the present proprietor is entered, with the date of first publication and the time of making the entry. Nothing further is required. The proprietor of a copyright is not bound to register his title until he has occasion to sue, and it is sufficient to make the entry the day before he brings his action.

*Higgins*, Q.C., and *Whitehorne*, for the Defendant :—

We distinctly raise the objection to the Plaintiff's title by our defence. The Defendant says he does not admit that the Plaintiff is now the proprietor of the copyright in the series of books called "*The Parlour Library*," or in the book called "*Trial and Triumph*," forming one of the said series, and he denies that there is or can be any copyright in the title thereof. The 16th section applies to two persons claiming the copyright of the same book, and the issue being raised between them, the Defendant is then bound to give

notice of the defence he means to rely upon; but here there are two distinct books owned by different persons. Again, that section does not apply, because the Plaintiff in his claim is not content with saying he is the proprietor of the copyright, but he takes upon himself to shew how he is the owner; he purports to trace his title from the original proprietor. We say, therefore, that the 16th section does not apply; but if it does, we have done all that is necessary by challenging everything by our pleadings on which the Plaintiff relies.

Our objections are, first, that the entry of the name of the publisher as *Newby & Co.* is not sufficient, but that the names of all the members of the firm should be entered; and it is not correct to enter the name of the first publisher, because the public should be able to go to the present publisher of the book. Then he should also enter the name of the first proprietor, with the devolution of title down to the present proprietor. If it be right to give the name of the first publisher, then there should certainly be an entry of the first proprietor, instead of which they give the name of the first publisher and the last proprietor.

Then we say that they do not now claim what they have registered. They have registered a book under the title of "*Trial and Triumph*," but they are not alleging an infringement of the copyright in that book which they have registered, but in the title of the book.

[They cited *Cox* v. *Land and Water Journal Company* (1), *Page* v. *Wisden* (2), and *Copinger* on Copyright (3).]



MALINS, V.C.:—

In my opinion these objections are wholly unsustainable. I have not now to go into the merits of the case, because objections have been raised to the registration by the Plaintiff, and without proper registration no action can be maintained. The question, therefore, is whether there has been a proper registration of the Plaintiff's book within the meaning of the provisions of the *Copyright Act*. It is admitted on both sides that it is not necessary for an author or publisher to register his work in order to be entitled to the copyright. He is the owner of the copyright as

(1) Law Rep. 9 Eq. 324. (2) 20 L. T. (N.S.) 435. (3) Page 68.

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between himself and the rest of the world, although he may have published the work forty years ago and it yet remains unregistered. But by the 24th section of the Act he is bound to register his copyright before he can maintain any action or suit at law or in equity in respect of any infringement of such copyright. Therefore, before he sues he must register. Mr. *Weldon*, being well aware of this provision in the Act of Parliament, did register this work on the 14th of June, 1877, in the form prescribed by the Act of Parliament. In that entry the name of the publishers and place of abode is "*Newby & Co., Welbeck Street, Cavendish Square, London;*" and the name and place of abode of the proprietor of the copyright is *Christopher Edward Weldon;* the date of first publication, "July 16th, 1854." That last is a material entry in the register for this reason, that you are bound to register in such a manner that the public may know the day of first publication, in order that they may tell when the copyright will cease by lapse of time. In this case it is said the registration is insufficient, because it does not state who was the original proprietor of the publication. And the question is whether that is necessary.

Now the requisites for registration are prescribed by the 13th section of the Act. It is, "After the passing of this Act it shall be lawful for the proprietors of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the Registry Book of the *Stationers' Company* of the title of such book" (that is admittedly done), "the time of the first publication thereof, the name and place of abode of the publisher thereof." There is but one publication, and not two publications, therefore the name and place of abode of the publisher means the name and place of abode of the person who first issues it. In this case it is Messrs. *Newby*, and that is correctly given. It is argued that it is not sufficient to say "*Newby & Co.*," but that the name of every partner in the firm should be inserted. In my opinion, that is totally unnecessary. *Longmans & Co., Walker & Co.*, or any other name by which a firm is known, is sufficient to insert as the name of the publisher, and "*Newby & Co.*" in this case is quite a sufficient description. In my opinion the only man who can answer the description of "publisher" is the man who first publishes the book.

Then a doubt is raised as to the fourth column, the "name and place of abode of the proprietor of the copyright." It is said that means the orignal proprietor. I am clearly of opinion it means nothing of the kind, but that it means the person who is the proprietor at the time the registration takes place. What difference can it make to anybody who the original proprietor was? It may be material to know who the original publisher is, the object being that a person registering may not pass off a fraudulent entry, but that he shall give the public an opportunity of inquiring of the publisher whether it was a genuine transaction, or whether the date has been fictitiously inserted, and therefore it is required that the name of the original publisher should be given; but it does not mean that the original proprietor, but that the present proprietor should be given. Upon this ground I am of opinion that the registration is perfectly sufficient. Those are the objections taken by the Defendant; all of which I think are wholly unsustainable.

With regard to the original proprietorship, it is said you ought to shew the devolution of title. The devolution of title stated in the statement of claim is, first, *Newby & Co.*, who assigned to *Darton*, and *Darton* assigned to the Plaintiff. That is distinctly stated. Now the Plaintiff contends: I am not bound to give you all the devolutions of title; it is quite sufficient if I shew you I am the proprietor. I am not bound to shew my title, because the 16th section of the Act prescribes that the Defendant in pleading to an action for pirating a book, shall give notice to the Plaintiff of any objections on which he means to rely; and if the nature of his defence is an objection to the title of the Plaintiff, then the Defendant must specify who he alleges to have been the first publisher or proprietor of the copyright therein, together with the title of such book, and the place where such book was first published, otherwise the Defendant shall not be allowed at the trial to give any evidence that the Plaintiff was not the author or first publisher of the book, or that he was not the proprietor of the copyright therein.

Therefore, it is not sufficient, according to the Act, that the Defendant should say you are not the author or proprietor, but that he should state who is the author and proprietor, and very fairly so.

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The meaning of it is that a Plaintiff is not to be taken by surprise by objections to his title which are not raised by the pleadings. A clear *primâ facie* case is shewn here, and if the Defendant had any ground for saying that Mr. *Weldon* was not the proprietor; that he had not derived his title by assignment from *Newby* to *Darton*, and *Darton* to himself, it ought to have been put forward as an objection under the 16th section, and he should have stated who he conceived was the proprietor. In my opinion every objection which has been taken entirely fails, and therefore the case must proceed upon its merits.

The evidence in the action was all taken *vivâ voce*.

On behalf of the Plaintiff, it was proved that the original novel entitled "*Trial and Triumph*," when first published in 1854, in three volumes, had a fair sale, and that No. 196 of the *Parlour Library* containing the same tale, had a sale of between 4000 and 5000, but that it had been out of print for some years. That the Defendant's book being entitled "*Trial and Triumph*" was calculated to mislead the public into the belief that it was a reprint of the original story, and that it was customary with publishers, when asked for a book which was published at two different prices to give the purchaser the cheaper edition; consequently that the Defendant's book, being published at 6*d*., might, in many cases, be given to a purchaser who did not specify the particular book required, in preference to the Plaintiff's book, if published at 2*s*. Evidence was also given of the sale of the copyright in "*Trial and Triumph*" by *Newby* to *Darton*, and of the sale by *Darton* to the Plaintiff of the copyright in sixty or seventy numbers of the *Parlour Library*, including "*Trial and Triumph*;" and, further, that the original novel, when published in 1854, was advertised in the "*London Catalogue*" of books, which was stated to be a book of general reference in the trade.

The evidence on behalf of the Defendant went to shew that there was an entire ignorance on his part when "*Trial and Triumph*" was first published in "*Bow Bells*" in 1875, that the title had ever been previously adopted. That an advertisement of the contents of "*Bow Bells*" was sent as the publications appeared, to all booksellers, and the fact ought therefore to have

been known by the Plaintiff, but no complaint had been made of any infringement of the Plaintiff's copyright till after the publication of the tale in "*Dicks' English Novels.*" That there was no catalogue of books generally recognised by the trade, and that the only proper method of ascertaining whether any particular title had been previously used was by reference to the registry at *Stationers' Hall*, which did not contain the Plaintiff's book until June 1877. That No. 196 of the *Parlour Library* had been out of print for at least twelve years, and was now quite unknown in the trade; that the Plaintiff had purchased the copyright of this particular number of the *Parlour Library* for a sum of one guinea only; and that two publications with the title of "*Trials and Triumphs*," being a colourable alteration of the Plaintiff's title, had been published long before the Defendant's book was brought out in "*Bow Bells.*"

Argument.

*Glasse*, Q.C., and *Byrne*, for the Plaintiff:—

We have proved our copyright in the book called "*Trial and Triumph.*" We have proved that the original publication in three volumes, and the subsequent publication in the *Parlour Library* series, produced a considerable profit, and we have a right to republish the work in a separate form whenever we think fit. The title of our book is an essential part of the work, since by that title it is known to the public, and any person wishing to purchase our book and finding another book under the same name would naturally be deceived, and would buy what they considered the cheap edition for 6*d.* in preference to giving 2*s.*: *Chatterton* v. *Cave* (1); *Metzler* v. *Wood* (2). We are the first producers of the article, which has become identified with our title, and the Defendant has no right to prevent us from having the benefit of the name we have selected: *Singer Manufacturing Company* v. *Wilson* (3). We made our complaint as soon as the Defendant published his tale in a separate form; we were not bound to know all the names of the tales in "*Bow Bells*," and it is proved that we had in fact no knowledge of the name having been used. Our book was first published in 1854, and the Defendant might have known that by reference to the *London Catalogue*.

(1) 3 App. Cas. 483. (2) 8 Ch. D. 606. (3) 3 App. Cas. 376.

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*Higgins*, Q.C., and *Whitehorne*, for the Defendant:—

The Plaintiff's claim is rested solely on copyright, and there is no allegation which does not point to copyright alone. Therefore, the first question is whether a man can have a copyright in a title —that is, in a mere name—under the *Copyright Act*. In the case of *Maxwell* v. *Hogg* (1), where an injunction was refused to restrain the exclusive use of the name of "*Belgravia*" for a magazine, Lord Justice *Cairns* there said (2), "I apprehend, indeed, that if it were necessary to decide the point, it must be held that there cannot be what is termed copyright in a single word, although the word should be used as a fitting title for a book. The copyright contemplated by the Act must be not in a single word, but in some words in the shape of a volume, or part of a volume, which is communicated to the public, by which the public are benefited, and in return for which a certain protection is given to the author of the work." These observations exactly meet the present case, where no copyright is claimed in the book published by the Defendant, but only in the title used for a totally different book. But we rest our case also on the words of the 2nd section of the *Copyright Act*, which states that the word "book" shall be construed to mean every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published; and the word "copyright" is to mean the exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is applied. Therefore you can only have copyright in the product of intellect, and not in a name, which depends on a different principle. They even claim to have all the plates of our book delivered up to be cancelled, when it is only our title that is complained of. The case of *Singer Manufacturing Company* v. *Wilson* (3) applies to trade names, which has nothing to do with copyright; and in the case of *Chatterton* v. *Cave* (4) it was decided that the words of the *Dramatic Copyright Act* (3 & 4 Will. 4, c. 15) must receive a reasonable construction, and must be treated as implying a substantial and material part of a production. The three words of this title cannot possibly constitute a substantial or material part of the book.

(1) Law Rep. 2 Ch. 307.
(2) Ibid. 318.
(3) 3 App. Cas. 376.
(4) Ibid. 483.

Then we say that the Plaintiff's book has been so long out of print that it is obsolete, and we cannot be prevented from adopting a title which is no longer in use. Suppose a man had registered a title thirty years ago, intending to publish a book under that name, surely he would not retain his right whenever he thought fit to appropriate that name, to the exclusion of every one else.

This book is proved to have been out of print for about twelve years; but not only so, it was, in truth, of no value, and the copyright was sold for only one guinea, and the attempt to prevent us from now using the name is utterly frivolous.

But suppose this case were rested on the right to use a trade name, no one ever heard of protection for a trade name which has been obsolete for twelve years.

Then we say that we have acquired the right to use the name by publishing the tale in "*Bow Bells*" so long ago as 1875. The then owner of the copyright, now claimed by the Plaintiff, never objected to our use of the name though it was republished in a monthly and in a half-yearly edition of "*Bow Bells.*" This action was not brought till after twelve months from the time of our publishing our book, and therefore, under the 26th section of the Act, the Plaintiff is now too late. But, again, we have as much right to the title as the Plaintiff has, since before the Plaintiff's book was first published in 1854, there was a book with the title of "*Trials and Triumphs,*" of which the Plaintiff's name is a mere colourable alteration, and another book with the same title of "*Trials and Triumphs*" was also published long before ours.

There is not a pretence for saying that the public could be deceived by these two books, which are of a totally different appearance.

*Glasse,* in reply:—

The Plaintiff could not have registered a title without a book as suggested, because the publication of a book must precede and not follow registration: *Henderson* v. *Maxwell* (1); *Low* v. *Ward* (2). The infringement of a title as part of a book was restrained in *Mack* v. *Petter* (3); *Bradbury* v. *Beeton* (4). We only ask to have

(1) 5 Ch. D. 892.
(2) Law Rep. 6 Eq. 415.
(3) Law Rep. 14 Eq. 431.
(4) 39 L. J. (Ch.) 57.

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the Defendant restrained from adopting our title, and we do not ask for damages nor the destruction of the plates of the Defendant's work, but we do ask that the Defendant should pay the costs occasioned by his refusal to comply with our reasonable demands.

Judgment.

MALINS, V.C.:—

The question in dispute arises between two publishers. It appears that in the year 1874 the Plaintiff, Mr. *Weldon*, bought the copyright of a portion of a work called "*The Parlour Library*," which was a series of volumes consisting partly of original works and partly of works which had been previously published. The particular novel "*Trial and Triumph*" was originally published by *Newby & Co.* in the year 1854, in a separate form, in three volumes. It was not an unsuccessful publication, as Mr. *Newby* states in his evidence; and Mr. *Darton*, the proprietor of the *Parlour Library* at that time, thought it worth his while to arrange with Mr. *Newby* to make it part of that work, and it was published about the year 1860 in the 196th number. Mr. *Darton* states that he sold from 5000 to 6000 copies of that number, and so far from its being unsuccessful, it is in evidence that every copy was sold. There is also evidence to shew that the work has been out of print for about twelve years.

Then it appears that in the year 1873 Mr. *Dicks*, the Defendant, who is the proprietor of a periodical called "*Bow Bells*," published weekly at the price of one penny, was offered a novel for publication, which was considered a good work, and was accepted. The author of the tale, Mr. *Palmer*, had given to it the title of "*True to the Core*," but upon its being ascertained that a drama had been brought out under that title, Mr. *Dicks* requested the author to change the title, and the name of "*Trial and Triumph*" was then adopted. I am satisfied that this was done in perfect ignorance on the part of Mr. *Dicks* that the title had ever before been used. The work was accordingly brought out in "*Bow Bells*" under the title "*Trial and Triumph*," and it was afterwards published in a monthly part of "*Bow Bells*," and again in a half-yearly publication of the same periodical. Subsequently to this Mr. *Dicks* republished the tale in a series of books entitled "*Dicks'*

*English Novels.*" It was in April, 1876, that Mr. *Weldon* purchased sixty-seven volumes of the *Parlour Library*, and there was an assignment to him of the copyright in these books from Mr. *Darton* in consideration of £345. One of the sixty-seven volumes was No. 196, which contained this tale of "*Trial and Triumph.*" He has already published eleven of the numbers, and it is in evidence that he has sold from 50,000 to 60,000 copies of those books; and if Mr. *Weldon* is correct in stating that there is a profit of about £30 upon every 1000 copies, it follows that he has made a profit of £1500 upon the eleven volumes, and therefore it may well be that the republication of "*Trial and Triumph*" will also be a profitable speculation. It seems that Mr. *Weldon* had already incurred some expense in preparing this work for republication when he saw the advertisement of "*Trial and Triumph*" to be published in *Dicks' English Novels.* A complaint was then made by Mr. *Weldon* to Mr. *Dicks* of this assumption of the title of his book, and after some correspondence upon the subject, and after a refusal by the Defendant to alter the title of his book, this writ was issued. The matter came before me on the 19th of July upon a motion for an injunction, but I declined to interfere, and I felt then, as I do now, that the dispute might have been readily settled if the Defendant would adopt a slight alteration in the cover of his book. No such arrangement, however, was come to, and the Plaintiff, thinking that the case might have been disposed of upon interlocutory application, appealed from my decision. That application was unsuccessful, and the case now comes before me upon the hearing.

I have already disposed of the preliminary questions as to the form of registration. It is admitted on both sides that an author may have a copyright in his work without registration; but before an action can be brought, an author is bound, under the Act 5 & 6 Vict. c. 45, to register his copyright, and I have decided that the book has been duly registered within the terms of the Act.

Then it has been argued that there can be no copyright in a name, and the case of *Maxwell* v. *Hogg* (1) has been cited in support of that argument. That case referred to a periodical known as "*Belgravia.*" Mr. *Hogg*, in 1863, had registered a periodical

(1) Law Rep. 2 Ch. 307.

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with the title "*Belgravia*," but he never published the magazine, and Mr. *Maxwell*, in ignorance that Mr. *Hogg* had conceived the idea of this magazine, decided upon publishing a work under the name of "*Belgravia*," and he advertised his work to be published on the 1st of October, 1866. Mr. *Hogg* then thought he would avail himself of his registration in 1863, and would get the start of Mr. *Maxwell*, so, as described by Lord *Cairns*, he collected various articles intended for other journals, and put the title "*Belgravia*" on a magazine which he published on the 23rd of September. Having the same title, and published six days before Mr. *Maxwell's* publication, he thought to stop *Maxwell* from using the title altogether, and that was the subject of *Hogg's* suit against *Maxwell*. Mr. *Maxwell* also filed a bill against *Hogg*, seeking to restrain his publication; and in the result both suits were dismissed with costs. Lord *Cairns*, in that case, expressed an opinion that there could be no copyright in a name. It must be borne in mind that he was dealing with a case in which Mr. *Hogg* had nothing but the name, and it had not been followed up by any publication; but if he had published one number on the 1st of September under the title of "*Belgravia*," it is plain the name would have been protected, as decided in the case of *Bradbury* v. *Beeton* (1), which referred to "*Punch*" and "*Punch and Judy*"; and it is to that sort of case alone to which Lord *Cairns'* observations are directed. But to say there is no title in a name as part of a publication, newspaper, book, or periodical, is, in my opinion, entirely absurd, and is not worthy of the time which has been consumed in considering it. The title of the book is part of the book; you cannot read any book, or turn over the title-page, without finding that the title is at the commencement of the book, that it is part of the book, and is as much the subject of copyright as the book itself. In this respect the case raises a point of considerable importance to proprietors of copyright and publishers generally. What is the extent of copyright in an author or proprietor of a work conferred by the Legislature? It is plain that every man who publishes a book under a particular name, the name forming part of the book, has a copyright extending to forty-two years, or the life of the author, whichever lasts longest;

(1) 39 L. J. (Ch.) 57.

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therefore the author of "*Trial and Triumph*," when it was published in 1854, acquired a title for that period.

But Mr. *Higgins* says, and this has been the great stress of the argument, that this work is out of print, and the trade have forgotten it; and he brings a number of witnesses to prove that the book has been quite forgotten, and that it is, as he expresses it, obsolete; and that, therefore, as the publishers and booksellers had forgotten it, and the public had forgotten it, it was a thing thrown into the dust, of no value, and the Defendant was entitled to adopt the name. It is very difficult to see to what extent that argument may be carried. If a man's work is so successful as this was, that in a limited time every copy printed is sold, does he, because he does not think it worth while to go on with the publication, lose his rights? It is something like the proprietor of a theatre who has had a certain piece performed for a great number of times. He goes on with it until the public begin to drop off, and then he substitutes something else. There had been two editions of this work, one in three volumes and the other in the *Parlour Library*, and the author might very well have said, "I do not think it will answer my purpose to republish this at present; it is out of print, but in due time I will consider whether it is worth my while to republish it." When does a man lose his rights? I asked that question of the learned counsel. Does he lose his right because he does not republish in one, two, three, or ten years? When does it cease? I have not got a satisfactory answer to that question. There was beyond all question a right in the proprietor of that work, a right of property which commenced in 1854, and ordinarily would last till 1896. When did it cease? I am unable to come to the conclusion that there is any particular period at which a man who is entitled to a copyright loses his right. The copies may have been all sold, but he may exercise the right he has of republishing at such periods as he thinks likely to answer his purpose and when he would find purchasers. Therefore it seems to me there was a continuing copyright in Mr. *Darton*, who was the proprietor before he assigned to Mr. *Weldon*, and when Mr. *Weldon* took the assignment in 1876 from Mr. *Darton*, he acquired a good title to the copyright in this work, and had a right to exercise his judgment as to when and how he would republish it, and in what form.

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Then Mr. *Higgins* says the Plaintiff lost his right because the works had been published in "*Bow Bells*"; but was Mr. *Weldon* bound to read every penny publication? There are hundreds of penny publications in *London* and the provinces. Is the Plaintiff bound to look at these publications to see whether any of the titles of the *Parlour Library* have been adopted? I think not. He says he did not read "*Bow Bells*," that he did not know of it; and there is not a shadow of reason for supposing he is incorrect in that statement. But he did know of it when published and advertised in a separate form, and he then comes to stop it. I do not think that the publication in "*Bow Bells*" can in any way affect Mr. *Weldon's* rights. There can only be acquiescence where there is knowledge. This Court never binds parties by acquiescence where there is no knowledge, though it is true that knowledge and acquiescence is in many cases fatal to parties. But, then, has he acquiesced to his knowledge? The first knowledge he possessed was when he saw the separate publication; and there, again, I had another argument upon one of the sections of the Act, which says that the action must be brought within twelve months of the offence being committed. Upon that point my opinion is that it applies only to an action for penalties. But even if it did apply to this, the first offence committed was the publication of the separate volume under the title of "*Trial and Triumph.*" That publication did not take place till April, the action was commenced in June, therefore it is long within the twelve months allowed by the Act. The action, therefore, was commenced in due time.

Then, if the right of copyright is not lost by non-publication, or by the book being out of print and being forgotten by many of the trade, what is there in the case to deprive Mr. *Weldon* of the copyright which he possessed in this work? It seems to me that Mr. *Weldon* had not lost the copyright; that he was entitled, whenever it seemed fit to him, to republish this work under its original title; and that Mr. *Dicks* has been wrong in assuming that title. But it is said, and one of the topics suggested in favour of Mr. *Dicks* is, that being in ignorance, as I am sure he was, of the previous use of the title, he thought he could not be affected by it; but I think he is bound to have the knowledge possessed by persons in his own line of business; and I am clearly

of opinion that I must regard this *Booksellers' Catalogue* as a thing universal in the trade. All the witnesses state that it is a book in universal use, therefore it does seem extraordinary that when the Defendant's reader objected to the title "*True to the Core*" it did not occur to him to look at the *Booksellers' Catalogue*, when he would have found that a book with the title of "*Trial and Triumph*" had been published by Mr. *Newby* in 1854. If he had done so this litigation would have been avoided.

Now, therefore, under these circumstances I feel bound to come to the conclusion that Mr. *Weldon* has the copyright in his work, that he had it when the dispute arose in 1877, that the fact of his having it ought to have been acquiesced in by Mr. *Dicks*, and that when he remonstrated and required an alteration to be made in the title, Mr. *Dicks* ought to have avoided the expense of this suit.

All the witnesses agree that the title of a book is a material part of the book, it is a valuable part of it, and the case is illustrated by a reference to Mr. *Thackeray's* work of "*Vanity Fair.*" Would any one be entitled to publish a book called "*Vanity Fair*," leaving out the author's name. A person buying the cheap edition would expect to get *Thackeray's* work, and what a fraud it would be if he had got some spurious thing which was not worth reading. Therefore, as all agree that the title of a book is a valuable property, I cannot admit the argument that a man through standing by loses his copyright, and I am of opinion that the Plaintiff has proved his title to the copyright and to the injunction, omitting, as is offered by the Plaintiff, that part of the claim which asks for a cancellation of all the plates used by the Defendant in publishing "*Trial and Triumph.*"

Now comes the important question as to who is to pay the costs of this suit. In deciding that question one must look to the conduct of the parties which has led to it. I think it is evident that more forbearing conduct on the part of the Defendant would have prevented this suit, and that if he had answered the letters addressed to him, or had adopted a more conciliatory course by altering the covers which I as well as the Lords Justices invited him to do, but which he refused to do, this suit might have been avoided. Every modification proposed has been rejected, and he

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was determined to fight this case out upon the utterly untenable ground that a man loses his copyright because the book has not been sold for some years; if a man will do this there is no other course to take but to say, that as his conduct has led to this litigation he must pay the costs of it.

There is another observation I may make. It was said that this copyright was bought for a very small sum, even as little as one guinea, but I think a man may give only a guinea for a thing which is very valuable, therefore I cannot accede to the argument that because he buys it at a small price he should be deprived of the title. The Defendant must therefore be restrained from publishing, selling, or offering for sale, any book, other than that of the Plaintiff, published in a separate form, intituled on the wrapper "*Trial and Triumph.*" The Defendant will pay the costs of the action and the costs of the motion, but not the costs of the appeal.

Solicitor for Plaintiff: *Henry Levy.*
Solicitor for Defendant: *A. W. G. Bell.*

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V.-C. M. 1878 *June* 24; *Dec.* 3.

## PICKEN *v.* MATTHEWS.

[1876 H. 13.]

*Will—Gift to a Class—Gift to Children at Twenty-five—Remoteness.*

Testator gave his real and personal property upon trust for the children of his daughters who should live to attain twenty-five. At his death one of his daughters had a child who had attained twenty-five:—

*Held*, that this gift was not void for remoteness, but was a valid gift to such of the children living at the testator's death as should attain twenty-five.

Statement.

*FRANCIS HOOFF*, by his will, gave his property, real and personal, to trustees on trust to pay certain legacies and annuities, and continued as follows: "Subject as aforesaid, I direct my trustees to stand possessed of my said trust estate, upon trust for such of the children of my daughter *Helen* by her first husband (but not her children by her present husband), and the children of my daughter *Charlotte*, who being sons shall live to attain the

age of twenty-five years, or being daughters shall attain that age or previously marry, whichever shall first happen; and I expressly direct that all such grandchildren shall participate equally without regard to the number of each family." And the testator empowered his trustees to maintain the children out of their expectant shares until they should respectively acquire vested interests in the trust estate.

Statement.

The testator died in December 1865. The testator's daughter *Helen* had at the date of the testator's death three children by her first husband, of whom the Plaintiff had attained the age of twenty-five at the date of the testator's death. *Charlotte* had two children who were infants.

Argument.

*Glasse*, Q.C., and *Badnall*, for the children of *Helen* and *Charlotte*:—

The only persons who could take under this gift were ascertained at the death of the testator, so there can be no remoteness. This case is governed by the decision in *Gimblett* v. *Purton* (1); *Andrews* v. *Partington* (2). One of the children within the gift having attained twenty-five at the date of the testator's death, the maximum number of the class was then ascertained, for no child born after one of the class had attained twenty-five could be included in the class: *Whitbread* v. *Lord St. John* (3).

[MALINS, V.C., referred to *Doe* v. *Sheffield* (4); *Doe* v. *Over* (5).]

The rule is laid down in *Jarman* (6); Supplement to *Lewis* on Perpetuity (7); *Gilbert* v. *Boorman* (8); *Viner* v. *Francis* (9).

*Pearson*, Q.C., and *Holland*, for the trustees.

*Higgins*, Q.C., and *H. A. Giffard*, for the next of kin:—

This is an indivisible gift to a class, not a severable gift, and therefore, if the gift to any part of the class is bad, that is fatal

(1) Law Rep. 12 Eq. 427.
(2) 3 Bro. C. C. 401.
(3) 10 Ves. 152.
(4) 13 East, 826.
(5) 1 Taunt. 263.
(6) 3rd Ed. p. 146.
(7) Page 53.
(8) 11 Ves. 238.
(9) 2 Bro. C. C. 658.

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to the whole gift: *Leake* v. *Robinson* (1). The gift is void for remoteness, being a gift to a class, some of which, according to the construction of the will itself, without regard to the circumstances which actually happened, might not have attained the age of twenty-five within the period of twenty-one years from the testator's death: *Griffith* v. *Blunt* (2).

[MALINS, V.C.:—That case is very shortly reported considering its importance, and seems inconsistent with the other authorities.]

*Hale* v. *Hale* (3); *Smith* v. *Smith* (4).

[MALINS, V.C.:—In that case the gift to the class was clearly good, and I cannot see how it could be made bad because, in the event of a possible substitution of issue, which did not occur, the substituted issue might not take vested interests within legal limits.]

*In re Sayer's Trust* (5). A bad gift cannot be made a good one by looking at the events which subsequently happened: *Porter* v. *Fox* (6); *James* v. *Lord Wynford* (7).

*Glasse*, in reply:—

*Williams* v. *Teale* (8) is an authority that you must look at the family as it existed at the death of the testator: *Mann* v. *Thompson* (9); *Wilson* v. *Wilson* (10); *Scott* v. *Earl of Scarborough* (11); *Singleton* v. *Gilbert* (12).

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Judgment.

Dec. 3. MALINS, V.C.:—

I have very carefully considered the cases which have been cited; and the conclusion to which I have come will have the advantage, that it will, I think, carry into effect the intention of the testator.

If the two daughters of the testator had had no children living at his death, the gift would have been void for remoteness; because

(1) 2 Mer. 363.
(2) 4 Beav. 248.
(3) 3 Ch. D. 643.
(4) Law Rep. 5 Ch. 342.
(5) Ibid. 6 Eq. 319.
(6) 6 Sim. 485.
(7) 1 Sm. & Giff. 40, 58.
(8) 6 Hare, 239.
(9) Kay, 638.
(10) 4 Jur. (N.S.) 1076; 28 L. J. (Ch.) 95.
(11) 1 Beav. 154.
(12) 1 Bro. C. C. 542, n.; 1 Cox, 68.

it would not be certain that the property would vest within a life or lives in being and twenty-one years after. But this is a gift to living grandchildren. The testator evidently knew that his grandchildren were in existence, and I must attribute to him knowledge of their ages, knowledge therefore that before his death the Plaintiff had attained the age of twenty-five years. Now, the rules of law applicable to this case are, first, that a gift to a class not preceded by any life estate is a gift to such of the class as are living at the death of the testator. The case of *Singleton* v. *Gilbert* (1) proceeded on that footing. There, there was a demise of real estate (subject to a term to secure annuities) to all the children of *A.*, and the heirs of their bodies. *A.* had two children at the death of the testatrix, and one born afterwards, but before the death of the annuitants. It was held that the afterborn child could not take, though if there had been a precedent life interest, that would have been enough to postpone the period of vesting. Lord Chancellor *Thurlow*, in giving judgment, says (2), "The general principle is that, where the legacy is given to all the children, it shall not extend to afterborn children; but where it is given with any suspension of the time so as to make the gift take place by a fair, or even by a strained construction (for so far some of the cases go) at a future period, then such children shall take as are living at that period. But in this case I can see no circumstance to take it out of the general rule." That is a decision that the devise extends only to those children who are living at the death of the testator. It is a rule of convenience.

The second rule is, that where you have a gift for such of the children of *A.* as shall attain a specified age, only those who are *in esse* when the first of the class attains the specified age can take. All afterborn children are excluded. This also is a rule of convenience. It was laid down in the case of *Andrews* v. *Partington* (3), and has been followed in numerous cases, of which *Hoste* v. *Pratt* (4), and a case before me of *Gimblet* v. *Purton* (5), are examples. In the latter case I proceeded on the principle that only those who were alive when the first of the class attained

(1) 1 Bro. C. C. 542, n.; 1 Cox, 68.
(2) 1 Cox, 71.
(3) 3 Bro. C. C. 401.
(4) 3 Ves. 730.
(5) Law Rep. 12 Eq. 427.

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twenty-one could take. The maximum number to take was then ascertained. Vice-Chancellor *Wigram*, in giving judgment in the case of *Williams* v. *Teale* (1), makes this observation: "If a testator should give his property to *A.* for life, with remainder to such of *A.'s* children as should attain twenty-five years of age, and the testator should die living *A.*, there is no doubt but that the limitations over to the children of *A.* would be void: *Leake* v. *Robinson* (2); but if in that case *A.* had died, living the testator, and at the death of the testator all the children of *A.* had attained twenty-five, the class would be then ascertained, and I cannot think it possible that any Court of Justice would exclude them from the benefit of the bequest, on the ground only that if *A.* had survived the testator the legacy would have been void, because the class in that state of things could not have been ascertained." So that he adopts the principle that when once the class to take has been ascertained there is no objection to postponing the vesting to a future period.

Upon the authority of these cases I come to the conclusion that the persons who can take under this limitation are those who were living at the death of the testator. *Viner* v. *Francis* (3), a leading authority on the subject, shews that the same principle prevails whether the parent of the children who are to take be alive or dead at the date of the will. I have already mentioned *Singleton* v. *Gilbert* (4) and *Viner* v. *Francis*. These cases, as well as *Doe* v. *Sheffield* (5) and *Doe* v. *Over* (6), all shew that a gift to a class only embraces those of the class who are living at the death of the testator.

Here there is a gift to such of a class as shall attain twenty-five. The class was ascertained at the death of the testator because one of them had then attained twenty-five. The two infant children of *Charlotte Heale* who were alive at the death of the testator are entitled to take provided they attain the age of twenty-five years.

The case mainly relied on by the other side was *Griffith* v. *Blunt* (7). There Lord *Langdale*, in giving judgment, said that

(1) 6 Hare, 239.
(2) 2 Mer. 363.
(3) 2 Bro. C. C. 658.
(4) 1 Bro. C. C. 542, n.
(5) 13 East, 526.
(6) 1 Taunt. 263.
(7) 4 Beav. 248.

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the will was really free from ambiguity; the vesting was not to take effect till twenty-five, and therefore the gift was too remote. But the real question was, In whom was the property to vest? Was the class to take ascertained at the death of the testator?

Here I hold that there is a valid gift because one of the children of *Helen* (by her former husband) had attained twenty-five at the death of the testator; the maximum number to take was, therefore, then ascertained, and the gift in question is not void for remoteness.

Solicitor for Plaintiff: *W. Harris.*
Solicitors for Executors: *Vizard, Crowder, & Co.*
Solicitors for the next of kin: *Park Nelson & Morgan.*

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## *In re* ASSOCIATION OF LAND FINANCIERS.

V.-C. M. 1878 *Dec.* 5.

*Appointment of Official Liquidator—Creditors.*

An official liquidator had been appointed in Chambers. Upon motion made on behalf of a very large majority of the unsecured creditors of the company, who alone were interested in the realization of the assets, two creditors were appointed liquidators instead of the liquidator already appointed.

Statement.

IN this case an order had been made to wind up a company called the *Association of Land Financiers.* Upon an application made in Chambers on the 28th of November last Mr. *Waddell,* an accountant, had, on the nomination of Mr. *Martin,* the first Petitioner, been appointed official liquidator. A motion was now made on behalf of 250 unsecured creditors of the company that the order appointing Mr. *Waddell* might be discharged, and two creditors, Mr. *Sims* and Mr. *Standing,* who were tradesmen in a large way of business, might be appointed official liquidators without salary. The shares were said to be all fully paid, and the property held by the secured creditors was said to be considerably more than sufficient for payment of their claims. The only persons interested in the estate, therefore, appeared to be the unsecured creditors, about 373 in number, whose claims amounted to about £165,000; of these, according to the statements made, 250, whose claims amounted to about £140,000, supported the motion.

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Argument.

*Glasse*, Q.C., *Higgins*, Q.C., and *Whitehorne*, in support of the motion:—

None but the unsecured creditors have any interest in the matter, and they ought to be able to appoint their own representative. In bankruptcy they would do so. The expense of an accountant as liquidator will probably be £15,000, and Mr. *Sims* and Mr. *Standing* are willing to undertake the office without salary. This is not a case of a complicated winding-up where calls will have to be made; the liquidators have only to sell the property, get in the debts, and divide the money amongst the creditors. In *In re Bessemer Steel and Ordnance Company* (1) and *In re Tunis Railways Company* (2) the wishes of the creditors were complied with.

(1) 1 Ch. D. 251.

(2) V.-C. M. May 22, 1874.

*In re* TUNIS RAILWAYS COMPANY.

THIS company was incorporated in July, 1872, with a capital of £250,000. Debentures were subsequently issued and subscribed for to the extent of £220,000. The railway intended to be constructed was partly finished, but more money was required for its completion, and the company being in difficulties resolved upon winding up voluntarily. On the 14th of January, 1874, the voluntary winding-up was continued under the supervision of the Court. A scheme was then proposed by a committee of the debenture-holders for the re-construction of the company, and at a meeting held on the 22nd of April the scheme received the sanction of twenty-nine out of thirty-one of the debenture-holders then present, the two dissentients holding between them sixty debentures.

A petition was now presented to obtain the sanction of the Court to the scheme approved of by the majority of the debenture-holders. It was proved by several witnesses that the value of the property of the company did not exceed £40,000, and it was proposed to pay out the dissentient debenture-holders by a proportionate part of the £40,000.

*Glasse*, Q.C., *Waller*, Q.C., and *Latham*, for the Petitioners, the committee of debenture-holders.

*J. Pearson*, Q.C., and *Brooksbank*, for the dissentients, submitted that this being a case of creditors and not shareholders, it did not come within the authorities in which the Court had given effect to the wishes of a majority in carrying out a scheme of reconstruction.

*Higgins*, Q.C., and *Graham Hastings*, for the liquidator.

MALINS, V.C., was of opinion that the principle of *Ex parte Fox* (Law Rep. 6 Ch. 176) and *Ex parte Poole's Executors* (Law Rep. 8 Ch. 702) applied to this case, in which an overwhelming majority of creditors had decided upon the propriety of taking a particular course in order to save their property from complete loss. He would, therefore, make an order confirming the scheme. Costs of all parties except the dissentient debenture-holders to be paid out of the estate.

Solicitors: *F. Heritage; Pulbrook.*

*Dauney*, for some secured creditors, supported the motion.

*Pearson*, Q.C., and *Oswald*, for three dissenting unsecured creditors:—

Argument.

It is said that all the other creditors have assented to this application, but it does not follow that they were informed of the facts. A proper meeting of creditors ought to be called, and a contrary conclusion would probably be then arrived at. A competent liquidator has been appointed who understands the business. He was proposed by the first Petitioner, who has a right to appoint the liquidator: *Buckley* on the Companies Acts (1). As to the expense, the proposed liquidators will be obliged to employ a solicitor and an accountant, and the expense will be quite as great. Moreover, this application ought to have been made in Chambers by summons, which might, if necessary, be adjourned into Court. This motion is unprecedented and irregular.

*Burton Buckley* (*Pearson*, Q.C., with him), for another dissenting creditor.

Judgment.

MALINS, V.C., after stating the different proceedings in the winding-up, and that in Chambers he had appointed Mr. *Waddell* official liquidator, as being an accountant who had had experience in such matters, continued:—

But I have now to decide whether Mr. *Waddell* is to continue official liquidator. It has been said that his charges will be £15,000; I cannot think that they will be so much, though according to my experience the expense of an official liquidator is very great, and is in small estates appalling. I have only one duty to perform, and that is to see that the assets are realized in the most speedy and least expensive method. The company is wholly insolvent, and it is clear that the shareholders have no interest in the matter. It is also clear that the fully secured creditors have no interest in the matter, and the only persons interested are the unsecured creditors. Now I am satisfied that an overwhelming majority of the unsecured creditors is against the appointment of Mr. *Waddell*, both on the ground of expense and because they

(1) 3rd Ed. p. 211.

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Judgment.

think that the assets will be better realized by merchants and tradesmen. It has been much pressed upon me that a merchant or tradesman cannot be competent to do such business, but I altogether dissent, and I see no reason why they should not, with proper assistance, sell this property, and get in the debts and pay the creditors, and deal with the assets in a proper manner. At the same time, I believe that those duties would be perfectly well discharged by Mr. *Waddell*. I am, under sect. 91 of the *Companies Act*, 1862, armed with power which I intend to exercise. That section says, "The Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories . . . and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the Court directs for the purpose of ascertaining their wishes." I at first thought it better to direct a meeting of creditors to be held in order to further ascertain their wishes; but it was suggested to me that there were disputes as to the amount of the claims of the creditors, and how can the Chief Clerk at such a meeting decide for what amounts the different creditors are to vote? If I am satisfied that Mr. *Sims* and Mr. *Standing* can well perform these duties, and will perform them gratuitously, so as to save the usual expense of an official liquidator, and are supported by those whose interests they are to represent, why should they not be appointed? If this had been a bankruptcy, the creditors and not the Court would have selected the trustee or assignee; and when the creditors have by a very large majority desired the appointment of these two gentlemen, I think I ought to accede to the motion. The creditors have a right to the management of their own affairs, not of course personally, as they are too numerous, but by their representatives, and they choose these two gentlemen.

If I had heard in Chambers all that I have heard to-day, I might then have come to the same conclusion, but from the limited time at my disposal it would be impossible to give all the time which has been given to this case in Court.

Solicitors: *Winter, Williams, & Co.; Linklater & Co.; Crook & Smith; E. Andrew; Norris, Allens, & Carter.*

## TABOR *v.* BROOKS.

V.-C. M.
1878
*Aug.* 1
*Nov.* 26.

[1876 T. 185.]

*Discretion of Trustees—"Uncontrolled and Irresponsible."*

Where in a marriage settlement the trustees had power to apply the income of the settled fund for the benefit of the husband and wife and their children as they should "in their uncontrolled and irresponsible discretion think proper," the Court, while expressing an opinion that the trustees were not acting judiciously, declined to interfere with their discretion, there being no proof of *mala fides*.

Statement.

BY a settlement upon the marriage of the Plaintiff, *Ada Agnes Tabor*, and the Defendant, *Arthur Tabor*, dated the 3rd of February, 1868, it was declared that the trustees, *Henry Brooks* and *C. J. Dowell*, should hold a sum of £10,000 transferred to them, upon trust to invest and pay the income to *Arthur Tabor* for life, and after his death, in case his wife should survive him and there should be a child or children of the marriage, to pay the whole of the income to her for life or until her second marriage, but in case there should not be any child of the marriage, to pay one moiety of the income to his wife for life or until her second marriage; and subject to such trusts the trustees were to hold the fund for the benefit of the children of the marriage, with an ultimate trust in default of children for the husband. And the settlement contained the following clause:—

"Provided always and it is hereby agreed and declared, that it shall be lawful for the said trustees or trustee for the time being, if they or he shall in their or his uncontrolled and irresponsible discretion think proper so to do, raise by the sale or conversion into money of a competent part of the trust premises for the time being subject to the trusts of these presents any sums of money, and to apply the same in the purchase, at such price as the said trustees or trustee shall in such discretion as aforesaid think proper, of the life interest of the said *Arthur Clifton Tabor* in the dividends, interest, and income of the trust premises to be assigned to the said trustees or trustee for the time being, to be held by them or him upon the trusts and subject to the provisions follow-

V.-C. M. 1878 TABOR v. BROOKS. Statement.

ing, namely: Upon trust that the said trustees or trustee shall, if they or he shall in their or his uncontrolled and irresponsible discretion think fit, but not otherwise, pay and apply such dividends, interest, and income, or any part thereof, in their or his discretion as the same shall become payable and without anticipation, for or towards the maintenance and personal support of the said *Arthur Clifton Tabor* and his wife (if any) and children or child or other issue for the time being in existence, whether by his said intended or any future wife, or at the discretion of the said trustees or trustee for or towards the maintenance and personal support of such one or more to the exclusion of the others or other of such objects of the present discretionary trust, in such manner and, if more than one, in such shares and proportions as the said trustees or trustee shall think proper during the remainder of the life of the said *Arthur Clifton Tabor*, or during such shorter period as the said trustees or trustee in such discretion as aforesaid shall think proper, and shall hold and apply so much of the said dividends, interest, and income as shall not be applied under the discretionary trusts aforesaid upon such trusts and subject to such provisions as the said dividends, interest, and income ought to be held and applied upon and subject to after the decease of the said *Arthur C. Tabor*."

The marriage between Mr. and Mrs. *Tabor* took place in February, 1868, and there had been one child only of the marriage—a son, born in August, 1871. The trustees executed the power of purchasing the life interest of Mr. *Tabor* in the settled fund, and by an indenture of the 29th of March, 1870, for the considerations therein mentioned paid out of the settlement funds, such life interest was assigned to the trustees to be held upon the trusts in that case provided by the settlement. It appeared that Mr. *Tabor* had for the last five years been addicted to very intemperate habits, and was frequently intoxicated, and violent in his conduct to his wife, so that it was impossible for her to live with him. Mrs. *Tabor* was without any means of support, and she had applied to the trustees to exercise the power given them by the settlement in paying a portion of the income of the trust property for her support, but they had refused to do so, and had paid the whole income to the Defendant, *Arthur Tabor*, and all they had given

her were several small sums of money, and they had latterly paid the school expenses of the child.

The action was brought by Mrs. *Tabor* against the trustees and against Mr. *Tabor*, claiming that the trusts of the settlement might be executed under the direction of the Court, and that the trustees might be restrained from paying the whole income of the trust funds to Mr. *Tabor*, and that a suitable part thereof might be ordered to be paid for the benefit of the Plaintiff.

Statement.

*Hadley*, for the Plaintiff:—

Argument.

Where a discretion is given to trustees to allow maintenance the Court has power to interfere and control that discretion. This was done by your Lordship in *Davey* v. *Ward* (1). These trustees are not exercising their power with discretion, but they are acting in an arbitrary manner. The peculiar power given them by this settlement was evidently intended to protect the wife against the event which has happened, that is, that in consequence of the intemperate habits of Mr. *Tabor* she is unable to live with him. Here there is a trust to apply the income for the maintenance of the husband and wife, and a discretion is given to the trustees as to the amount to be so applied. It is for the Court to say how much ought to be applied, having regard to the circumstances of the case: *Ransome* v. *Burgess* (2). The same principle may be derived from the cases of *Webb* v. *Earl of Shaftesbury* (3), where the Court controlled the trustees in the appointment of new trustees; from *In re Beloved Wilkes' Charity* (4), where the Court said that trustees must exercise their discretion with honesty of intention and with a fair consideration of the subject, and it was the duty of the Court to see that the discretion of trustees has been thus exercised; and from *Attorney-General* v. *Clack* (5) and *Cafe* v. *Bent* (6).

*Vaughan Hawkins*, for the trustees:—

The power given to the trustees is not an ordinary discretion with which the Court can interfere, but it is in their "uncontrolled and irresponsible discretion," and in such a case the Court never

(1) 7 Ch. D. 754.
(2) Law Rep. 3 Eq. 773.
(3) 7 Ves. 480.
(4) 3 Mac. & G. 440.
(5) 1 Beav. 467.
(6) 3 Hare, 245.

V. C. M. 1878 TABOR v. BROOKS. Argument

interferes with the discretion of the trustees. This was laid down distinctly in *Gisborne* v. *Gisborne* (1); and although in *Davey* v. *Ward* (2) your Lordship exercised a controlling power where the trustees had a mere discretion as to the amount they should pay for maintenance, yet you there stated that if the power given was "absolute and uncontrollable" you could not interfere.

There is nothing in this case to shew that the trustees are not acting fairly and honestly, and to the best of their judgment. There is no pretence for alleging *mala fides* on their part: *Lewin* on Trustees (3).

*Dunning*, for the husband.

Judgment.

NOV. 26. MALINS, V.C.:—

Before the marriage took place between Mr. and Mrs. *Tabor* it was well known that Mr. *Tabor* (who was then a young man of about twenty-five) had long been addicted to habits of intemperance, but he promised his intended wife that he would reform and lead a life of sobriety, and she, unfortunately for herself, believed him. As might have been expected, however, he soon after the marriage returned to his old habits, and the result has been a life of misery and deprivation to the Plaintiff, which has obliged her for the last four years, or thereabouts, to live separate from him; it being impossible, as she says, on account of his drunken habits, that she should live with him. That he has been, and I fear still is, a drunkard of the worst description, is, I think, abundantly proved, and is taken as admitted. The question I have now to decide arises under the marriage settlement of the parties, dated the 3rd of February, 1868, which is in a very unusual form—no doubt on account of the then well-known habits of Mr. *Tabor*. [His Lordship stated the effect of the settlement.]

The trustees having executed the power of purchasing the life interest of Mr. *Tabor* in the settled fund, the result is that they now hold such of the trust funds as have not been advanced to

(1) 2 App. Cas. 300. (2) 7 Ch. D. 754.
(3) 6th Ed. p. 511.

Mr. *Tabor*, under a power contained in the settlement, upon the trusts in that case provided for by the settlement.

It appeared before me upon an application in Chambers, that Mr. *Tabor* is now living in *France*, that Mrs. *Tabor* is living in *London*, wholly unprovided for, and that their son, now rather more than seven years old, is placed at school at *Brighton* at an expense of about £60 a year, which is paid by the trustees out of the trust funds, and that they were paying the whole of the remaining income, amounting to about £300 a year, to Mr. *Tabor*, leaving Mrs. *Tabor* wholly destitute. Being then satisfied, as I am now, that Mr. *Tabor* has, almost from the time of his marriage, been of such confirmed drunken habits as to justify his wife in not continuing to live with him, I thought a fair application of the £300 a year would be to give it in equal shares to the husband and wife while they continued to live apart.

The trustees, however, who are both brothers-in-law of Mr. *Tabor* (Mrs. *Tabor's* brother, Mr. *Dowell*, having retired in consequence of residence abroad), think that Mrs. *Tabor*, notwithstanding the circumstances I have mentioned, ought to live with her husband; and, I suppose with the view of compelling her to do so, have paid the whole of the £300 a year to him, and they insist that they have an uncontrollable right to do so, with which the Court cannot interfere, and for the purpose of having that point decided the case was brought into Court.

The question I have to decide, therefore, is whether the absolute discretion which is vested in the trustees can be controlled by the Court.

As a general rule, the Court will not interfere with the discretion of trustees where it is fairly and honestly exercised. This was laid down in *Costabadie* v. *Costabadie* (1) and in *In re Beloved Wilkes' Charity* (2); and many other cases may be referred to to shew that. But if they exercise their discretionary power in an arbitrary and unreasonable manner, the Court will control them, as I did in *Davey* v. *Ward* (3), where trustees capriciously persisted in not letting a father have the whole of a small income for the education and support of his children, though it was urgently needed

(1) 6 Hare, 410. (2) 3 Mac. & G. 440.
(3) 7 Ch. D. 754.

V.-C. M. 1878 TABOR v. BROOKS. Judgment.

on account of his limited means. The authorities on that subject are sufficiently stated in that case, and I need not further refer to them. But here the power or discretion is to be uncontrolled and irresponsible, and Mr. *V. Hawkins* relied upon the decision of the House of Lords in *Gisborne* v. *Gisborne* (1) to shew that such a discretion cannot be controlled by the Court. In that case a fund was vested in trustees who were given "an absolute discretion and uncontrollable authority" over its application, and it was held that the Court could not interfere with the discretion of the trustees in the application of the fund, always supposing that there was no *mala fides* with regard to its exercise. I think that case is conclusive that under such a power or discretion as this the Court cannot interfere with the trustees so long as there is no *mala fides* on their part. Although that case was not cited in *Davey* v. *Ward* (2), I appear to have taken that view of such a power in the passage of my judgment (3) where I said, "If the discretion of the trustees is to be absolute and uncontrollable, the Court will not interfere."

Here, although in the distressing circumstances of the case the trustees would, in my opinion, act more wisely in dividing the fund between the husband and wife than in giving it all to the husband, I cannot attribute any *mala fides* to them in the course they take, and I regret therefore that I am unable to interfere with them.

Solicitors: *W. Stuart; Shoubridge & May.*

(1) 2 App. Cas. 300. (2) 7 Ch. D. 754.
(3) 7 Ch. D. 761.

## PETER *v.* STIRLING.

V.-C. M.
1878
Dec. 14.

[1878 P. 74.]

*Administration—Colonial Duties—Pecuniary and Residuary Legatees.*

A testator whose assets consisted partly of personal estate in the colony of *Victoria*, where duty is payable on the property of all deceased persons, died domiciled in *England*, and by his will gave many pecuniary legacies, and divided the residue among some of the pecuniary legatees:—

*Held*, that the duties attaching in *Victoria*, and all expenses of realization were payable out of the general estate before distribution, and that the pecuniary legatees were entitled to their legacies free of all colonial duties and expenses except the English legacy duty.

Statement.

*JOHN PETER*, formerly of the colony of *New South Wales*, but at the time of making his will domiciled in *England*, by his will, dated the 29th of March, 1876, appointed the Defendants executors and trustees thereof, and after making divers specific bequests and bequeathing to his wife an annuity of £2000 a year, the testator gave various legacies for the benefit of his sisters, nephews and nieces, and he gave the residue of his real and personal estate to trustees with directions to sell and convert, and the testator directed that the net residue should be divided among certain of the pecuniary legatees in the same proportions in which they took the total amount of the legacies of gross or capital sums thereinbefore bequeathed to them.

The testator died in January, 1878, and at his death was seised and possessed of real and personal estate to the value of about £700,000 in *Great Britain* and in the Australian colonies of *New South Wales*, *Victoria*, *Queensland*, and *South Australia*. The real and personal estate in *Victoria* was liable to a duty to the government of that colony. Questions had arisen in regard to the administration of the testator's estate, and in particular as to the persons by whom the said duty payable in *Victoria* ought to be borne, and the Plaintiffs' claim was for the administration of the estate.

For the residuary legatees it was contended that the Victorian duty, which was estimated at £2800, was payable by each legatee

V.-C. M. 1878 PETER v. STIRLING. Statement.

on the same proportion of his legacy which the assets in *Victoria* bore to the whole assets.

For the legatees and annuitants not participating in the residue it was contended that the whole of the duty payable in *Victoria* should be paid out of the residue as part of the necessary expenses of obtaining possession of the property in that colony, and of converting and remitting it to this country, where the estate had to be accounted for in this action, and where legacy duty had to be paid on the whole fund.

It appeared that there were no probate or succession duties in the colonies of *Queensland* or *New South Wales*, but there was a duty on the estates of deceased persons in the colony of *Victoria*. That duty was calculated upon the final balance appearing upon the statement brought in by the executor or other person required to specify the particulars of the estate, after deducting the amount of the debts due by the deceased. The duty varied according to the value of the testator's assets, and where such assets did not exceed £30,000 the rate of duty was £5 per cent., if over £30,000 and under £40,000 the duty was £6 per cent., and if over £40,000 and under £60,000 the duty was £7 per cent., but in the case of a widow of any testator being entitled under the will, the duty was to be calculated so as to charge only one-half of the percentage thereinbefore mentioned upon property devised or bequeathed to the widow. And by the Act of the *Victoria* Legislature, 1871, No. 388, under which the duties were chargeable, it was provided—Sect. 10: "The duty payable under this Act shall be deemed to be a debt of the testator or intestate to Her Majesty, her heirs and successors, and shall be paid by any executor or administrator with the will annexed out of the personal estate of the testator after payment of the testamentary and funeral expenses in priority to all debts of the testator, and if the personal estate be insufficient to pay such duty, the executor or administrator with the will annexed, or any person interested, may apply to the Supreme Court, which may order that a sufficient part of the real estate of the testator may be sold to pay the said duty, the costs of such order and sale and consequent thereon." Sect. 11: "Every executor or administrator, or administrator with the will annexed, shall deduct from each and every devise, bequest, and legacy

coming to any person under any will, an amount equal to the duty upon such devise, bequest, or legacy, calculated at the same rate as is payable upon the estate under this Act, unless the testator shall have made a different disposition as to the payment of the said duty in his will." Sect. 12: "No probate, letters of administration, or rule to administer, shall issue from the Master's office until the duty or fee, as the case may be, under this Act has been paid, and the Master or officer shall certify by endorsement on every probate, letters of administration, and rule to administer issued, that the duty or fee has been paid, and the amount thereof; and no probate, letters of administration, or rule to administer shall be receivable in evidence in any Court of Justice unless it shall bear such endorsement." And it was further enacted that a sum not exceeding £5 per cent. should be allowed out of the assets of any deceased person to his executors or administrators on passing his accounts, as commission or percentage for his pains or trouble, as should be just and reasonable.

Statement.

*Glasse*, Q.C., *J. D. Wood*, *R. O. Turner*, and *E. Ward*, for the residuary legatees:—

Argument.

By the *Colonial Act* the duty chargeable in *Victoria* is payable on the net balance of the testator's estate, and is deducted from the payments to the legatees, but as to so much as is payable to the widow the duty is reduced by one-half. This duty appears to be partly of the nature of English probate duty and partly of the nature of English legacy duty. If it is like probate duty it is confined to property recoverable in the colony, but if it is like legacy duty it is payable only when the testator was domiciled in the colony. Assuming that it is payable wherever the testator was domiciled, then the question arises by whom is it payable in this particular case? We contend that the proper course is to pay all legacies rateably out of the personal estate in *Victoria*, and the personal estate elsewhere, so that, if the personal estate in *Victoria* be one-twentieth of the whole, each legatee must allow a deduction from his legacy of £3 per cent. English duty on the whole legacy, and also £6 per cent. *Victoria* duty on the one-twentieth of the legacy, making together £3 6*s.* per cent. upon the

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whole. Under any circumstances the widow can only be charged with half of the *Victoria* duty.

[They cited *Wallace* v. *Attorney-General* (1); *Bell* v. *Master in Equity of Supreme Court of Victoria* (2).]

Argument.

*J. Pearson*, Q.C., and *Wolstenholme*, for the specific legatee:—

The testator was domiciled in *England*, the legatees are in *England*, and can sue for and are entitled to be paid their legacies here according to English law; they have nothing to do with the situation of the testator's assets. By English law his personalty is considered situated where he is domiciled, and it is the business of the executors to realize all property out of *England*, to have the proceeds remitted to *England*, and to distribute the whole estate here as one fund. All costs of so doing are expenses of administration which properly fall on the residue. The legatees living here can no more be required to contribute to payment of taxes and costs required to be paid in another country in order to recover and get in the testator's estate there, than they can be required to contribute to the expenses of remitting home the proceeds, or to the payment of auction fees, stamp duty, or commissions, on realizing the testator's property. All the assets should be brought to *England* for administration here, and when so brought are liable to pay the legacies without any deduction except English duty.

Moreover there are assets elsewhere than in *Victoria* more than sufficient to pay the legacies, and the residuary legatees have no right to throw any part of the legacies on *Victoria* assets.

Judgment.

MALINS, V.C.:—

This appears to me to be a very clear case. The point arises in this way. Mr. *John Peter*, who died about a year ago, left a fortune of great value—about £700,000—as I understand. He was domiciled in *England*, and he gave general legacies to the amount of something between £400,000 and £500,000, and then he directed that his residuary estate should be divided, not among all the pecuniary legatees, but among some of them in proportion to the

(1) Law Rep. 1 Ch. 1. (2) 2 App. Cas. 560.

amount of each legacy, so that a legatee of £20,000 gets double the amount of residue which comes to one who gets £10,000. There are abundant assets to pay every legatee, and to leave a large residue of £200,000 or £300,000. It so happens that the testator made his fortune principally in the colony of *Victoria*, at *Wagga Wagga*. Some of his assets, but only a small portion of them, are in that colony. In that colony there is an Act making the estate of every deceased person pay certain duties, and those duties are to be deemed a debt of the testator or the intestate as the case may be. Now let me put the case suggested in argument. Suppose the assets in *Victoria* are £25,000, then that £25,000 must pay the duty which is imposed by the Act as a debt due from the testator; and suppose that takes £3000, or, for illustration, say £5000, what is the consequence? The consequence is that the general estate of the testator which will be received by the executors here would not be £25,000 but £20,000. Now it is contended, inasmuch as this is an expense incurred in getting the property from *Victoria*, that the pecuniary legatees who are to be paid partly out of those funds must bear their proportion of the duties imposed in the colony; but it appears to me as plain as that two and two are only four, that the general estate which comes into the hands of the executors here is the amount that remains after paying the expenses in *Victoria*, and therefore the property must pay its proper proportion under the Act in *Victoria*. If that is £5000, then the executors get the £20,000, as forming part of the general assets, and out of those general assets all the legacies must be paid free of all deductions except those to which they are liable by the law of *England*. Then the question is raised whether it is like probate duty or legacy duty. If it is legacy duty, then it is said to be like a debt the testator owed. It might as well have been argued that, if the testator had owed £5000 in the colony of *Victoria*, when they got the £25,000 less the £5000 which he owed to an individual, the legacy must pay part of that debt, whereas the assets are those that remain after paying the debts; and the debt is here a debt of 5 per cent. due to the Government, and what you get, after paying the debt or duty imposed, comes here as part of the general estate, and after those deductions there remain in the hands of the executors the assets

V.-C. M. 1878 PETER v. STIRLING. Judgment.

to pay debts and general legacies payable out of the general estate. With regard to the question whether it is legacy or probate duty, I think it is immaterial, though I am bound to say if it is like either of them it is much more like probate duty than legacy duty. It is perfectly clear that, whatever are the expenses of getting these assets in *Victoria*, whether they are the expenses of calling them in, or selling property, or paying duty to the Government, they are all deductions to be made as expenses of the estate to be paid out of the estate generally; and that which remains after paying all the debts of the testator, remains as assets of the testator and goes to pay the legacies in full, and there is no obligation on the legatees to pay part of those expenses.

Then as to the commissions that have to be paid, and the expenses of taking out advertisements, and so forth, they all form part of the expense of realization, and will come out of the general estate.

Solicitors: *Domville, Lawrence, Graham, & Long; Ward, Mills, Witham, & Lambert.*

## BARRETT *v.* HAMMOND.

V.-C. B.

1879

*Jan.* 11, 23.

[1878 B. 115.]

*Defaulting Trustee—Writ of Attachment—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4—*Debtors Act*, 1878 (41 & 42 *Vict. c.* 54), *s.* 1.

The policy of the Debtors Acts, 1869 and 1878, in leaving a defaulting trustee exposed to the penalty of imprisonment is not vindictive; the object of the penalty is simply to produce payment of the money.

Where it is shewn that imprisonment of a defaulting trustee will not be productive of payment, the Court, in the exercise of the discretion given by the *Debtors Act*, 1878, will refuse an application for a writ of attachment.

20 Ch D 382-3,

### MOTION.

Statement.

By an order in this suit dated the 25th of July, 1878, it was ordered that the Defendant *Edwin Hammond* should, on or before the 6th of August, or subsequently within fourteen days after service of the order, pay into Court to the credit of the action the sum of £204 5*s.*, appearing by his affidavit filed the 19th of July, 1878, and the account exhibited thereto, to be in his hands as trustee and executor of the will of *John Leach*, deceased, the testator in the action.

The Defendant made default, and on the 16th of December notice of motion was served on him that a writ of attachment might be ordered to issue against him for non-compliance with the order.

By an affidavit filed on the 19th of December the Defendant deposed, "I have no means at present of paying the sum of £204 5*s.* referred to in the notice of motion, or any part thereof; nor am I aware when I shall be able to pay such sum or any part thereof."

Argument.

*Pace*, for the Plaintiff, now moved accordingly.

*Charles Browne*, for the Defendant:—

Sect. 4 of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), excepts out of the operation of the statute a default by a trustee or person acting in a fiduciary capacity, and ordered by a Court of Equity

Distd Harris v Ingram 13 Ch D 338 H C

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to pay any sum in his possession or under his control. But now, by sect. 1 of the *Debtors Act*, 1878 (41 & 42 Vict. c. 54), a discretion is given to the Court to inquire into the case, and the Court is empowered to grant or refuse, either absolutely or upon terms, any application for a writ of attachment.

In a case of *Street* v. *Hope*, before Vice-Chancellor *Malins* on the 12th of December, 1878, where the defaulting trustee deposed that he could not obey the order of the Court because he had no pecuniary means, the Vice-Chancellor refused to make any order on the motion. In this instance the debtor says he has no means.

BACON, V.C., ordered the motion to stand till the 23rd of January, in order that the circumstances of *Street* v. *Hope* might be inquired into.

Jan. 23. *C. Browne* again referred to *Street* v. *Hope* (1):—The

(1) V.-C. M. Dec. 12, 1878.

STREET *v.* HOPE.

[1876 S. 432.]

THIS was an action commenced by writ on the 18th of November, 1876, on behalf of infants named *Street*, by their mother and next friend, against *John Hope* and *Charles William Havers*, who in June, 1874, were appointed new trustees of the marriage settlement, dated in August, 1856, of Mrs. *Street*. The statement of claim was to the effect that the Defendants had sold out the whole or a large portion of a sum of £1000 New £3 per Cent. Annuities, part of the trust funds, and had reinvested the same upon insufficient and unauthorized security, and prayed that the Defendants might be decreed to replace and transfer the said sum into Court, subject to the trusts of the settlement.

The Defendant *Hope's* defence was immaterial for the purposes of this report.

The Defendant *Havers*, by his statement of defence, admitted that he and the Defendant *Hope*, at the request of Mrs. *Street* and her husband, sold out the whole of the £1000 stock on the 12th of July, 1874, and proceeded to narrate circumstances, which came to this, that the sale took place in order that the proceeds might be advanced, and that the same were advanced, for the purpose of satisfying creditors, with whom *Street*, who was in business as a shoemaker at *Tunbridge Wells*, had agreed to settle by instalments.

The Defendant *Hope*, by his statement of defence, said that during the whole of the last-mentioned proceedings *Street* was dealing with *Havers* for goods in his trade, and that *Street* complained to Defendant that he had been compelled by *Havers'* firm to take and pay for goods amounting to nearly £300 in a little more than twelve months. He further alleged that the Defendant *Havers* had retained a large portion of the trust money for his own use.

*Havers*, in rejoinder, admitted the last-mentioned business transactions,

principle of the learned Vice-Chancellor's decision was that the policy of the statute is not vindictive, and that imprisonment

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and that *Street* was indebted to *Havers'* firm in a sum of £35; but absolutely denied that he had applied any of the trust moneys to his own use.

On the 6th of November, 1877, the Court made an order directing the Defendants *Hope* and *Havers* to transfer into Court to the credit of the action the sum of £442 11*s.* 6*d.* stock within one month from service of the order.

Notice of motion on behalf of the Plaintiffs that they might be at liberty to issue a writ of attachment against *Hope* and *Havers* for not having made the transfer into Court ordered on the 7th of November, 1877, was dated the 11th of November, 1878.

The Defendant *Havers* filed an affidavit, in which he said:—

"I am unable to transfer £442 11*s.* 6*d.* New £3 per Cent. Annuities into Court in compliance with the order of the 6th of November, 1877; I have not the pecuniary means.

"I have no income from any source except what I derive from the business of *Jones & Havers*, of 3 *Charles Street* aforesaid, in which business I am a working partner only, and since I have been unable to work in the business I have not had any income except that which my wife has earned from working in the said business of *Jones & Havers;* and if from any cause my wife should be unable to continue to work in the said business I should be without any income whatever, and totally destitute. I have no capital in the business, and I never was other than a working partner, and it has not at any time produced me more than £2 10*s.* a week for my share.

"The Plaintiffs have sold my household furniture under a writ of sequestration for £23 0*s.* 6*d.*, being, as I am informed, a less sum than the costs they have incurred in relation to such writ.

"I have been unable to work for the last three and a half years and upwards, and am now unable to do anything or help myself. I am impoverished by the proceedings in this action, and in consequence of my inability to work I have been obliged to avail myself of the sick allowance from the society of *Foresters*, of which I am a member."

The Defendant *Havers'* partner in business, *Joseph Jones*, confirmed the above statements, and further deposed as follows:—

"The said Defendant has not been able to take any active part in the business for the last three and a half years, and all the work that has been done on his behalf has been done and performed by the said Defendant's wife."

*Charles Browne*, for the Plaintiffs, moved for the writ:—

The Legislature, in passing the Act of 1878, could not have intended to abolish the penalty of imprisonment merely because the defaulter cannot pay the debt. The object of the Plaintiffs is to use the threat of imprisonment in order to induce the Defendant to pay. The money was lent to the *cestui que trust*, in order that he might pay back a debt due to the firm of *Jones & Havers*.

The Defendant *Hope* did not appear.

*Whitehorne*, for the Defendant *Havers*:—

This is eminently a case for the exercise of the discretion reposed in the Court by the Act of 1878. No

V.-C. B. 1879 BARRETT v. HAMMOND. Argument.

is to be inflicted only where there is a probability of its being productive of the money.

*Pace*, in reply:—

The matter is one of discretion; and the discretion of the Court will be exercised only on consideration of the merits of the case.

*Street* v. *Hope* was not analogous to this. There it was shewn that the money was advanced at the request of the *cestui que trust*. There is no such case here; the inference is that this trustee got the money in, and spent it. The Plaintiffs are entitled to the writ.

Judgment.

BACON, V.C.:—

It is quite true that the case before the Vice-Chancellor *Malins* differed as to the facts from the case now before me. But the judgment of the Vice-Chancellor did not proceed upon those facts—it went upon the general policy of the law.

Now the policy of the law is plain enough. It appears from the language of the statute. The general policy of the *Debtors Act*, 1869, gave the Judge no power to inquire, before allowing the

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good purpose will be served by sending this man to prison.

*Browne*, in reply.

MALINS, V.C.:—

Before the Act of 1878 there were many cases of great hardship in which trustees were sent to gaol for having committed breaches of trust when no moral blame attached to their conduct. Consequently the Legislature has in the last session passed an Act giving the Judge power to inquire into the case, and to grant or refuse the application for a writ of attachment either absolutely or on terms.

In this case the circumstances have been inquired into. It is found that this man has got into difficulties through lending a portion of the trust moneys to the *cestui que trust*, a thing he was not justified in doing. But to send him to prison would not enable him to pay the money—it would not be productive of payment of the debt. Mr. *Browne* says that the threat of imprisonment will induce him to pay the money. I am not sure of that; there is evidence that the man is in a bad state of health.

The Court has power to grant or to refuse an application of this kind, and in the exercise of my discretion I refuse the present application. There will be no order on the motion as to costs or otherwise.

Solicitors: *Minet, Smith, Son, & Harvie; C. E. Goldring; Pearce & Son.*

writ to issue, whether the debtor had the means of satisfying the order or not. But the Amendment Act of 1878 gives to the Court a jurisdiction, which it did not possess before, of inquiring into the case, and of either granting or refusing the application for the writ of attachment.

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The question then comes to this, whether it will serve any good purpose to send this man to gaol. The law does not act vindictively; the Court has no power to inflict any punishment upon the man; and sending him to prison will not enable him to pay this money.

I can make no order in this case, as to costs or otherwise.

Solicitors: *R. B. T. Barrett; Denton, Hall, & Barker.*

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## CROOKES *v.* WHITWORTH.

V.-C. B. 1878 *Nov.* 30.

[1878 C. 291.]

*Practice—Partition Act*, 1876 (39 & 40 *Vict. c.* 17), *s.* 6—*Request by Persons under Disability—Form of Judgment.*

16 CLD 362-4

In a partition action by a married woman and her husband her request for sale may be made by her counsel authorized to act on her behalf.

THIS was a partition action between co-heiresses, of whom one was joined with her husband as Plaintiff without a next friend, and the others were made Defendants. Statement.

The Plaintiffs and Defendants concurred in requesting a sale, and the only question was as to the mode in which the request on the part of the married woman should be expressed.

*Solomon*, for the Plaintiffs:— Argument.

By the *Partition Act*, 1876, s. 6, a request for sale may be made on the part of a married woman, &c., or person under disability, by the next friend, &c., "or other person authorized to act on behalf of the person under such disability." There is no next friend in this case, as the married woman Plaintiff sues with her husband. It is submitted that the request may be made by



Argued in writing Granger Whitt 16 CLD 362-4

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Plaintiff's counsel, who is authorized to act on her behalf for this purpose. He referred to *Higgs* v. *Dorkis* (1).

*G. Williamson*, for the Defendants.

Judgment.

BACON, V.C.:—

As you tell me you are duly authorized, I think that will do. The order may be prefaced by a statement that "the Plaintiffs and Defendants by their counsel duly authorized, requesting a sale, &c.," which will shew that the terms of sect. 6 have been complied with.

The order as drawn up was thus prefaced:—"The Plaintiffs and the Defendants, who claim to be the sole parties interested in the hereditaments in the statement of claim mentioned, by their counsel, who are authorized to act on behalf of such of the Plaintiffs and Defendants as are married women, requesting a sale &c." Reg. Lib. 1878, A. 2167.

Solicitors: *H. J. V. Philpott*, agent for *S. Redfern, Chesterfield; Williamson, Hill, & Co.*, agent for *Bagshawe, Sheffield.*

(1) Law Rep. 13 Eq. 280.

*Followed.* BARRATT v. GOUGH-THOMAS [1951] 1 Ch. 242

## SHEFFIELD *v.* EDEN.

C. A. 1878 Nov. 27.

[1876 S. 132.]

*Solicitor—Lien—Mortgage by Client to his Solicitor.*

A client mortgaged property, which was at the time subject to a first mortgage, to his solicitors, who prepared the mortgage deed to themselves. Afterwards the mortgagor made a third mortgage to another person:—

*Held*, in an action by the solicitors against the first and third mortgagees and the mortgagor, that they were entitled only to their ordinary costs as mortgagees, and that they had no lien on the mortgage deed for the costs of its preparation or other costs due to them from the mortgagor.

Statement.

BY two indentures dated the 13th of January and the 30th of March, 1868, *Thomas Edward Eden* (since deceased) conveyed certain freehold pieces of building land to the Plaintiffs, *Isaac Sheffield* and *Thomas Needham Sheffield*, and their heirs, by way of mortgage for securing the repayment of sums of money which they had agreed to advance on his account to a builder.

The property was at that time subject to a first mortgage for £12,000 to another person, and the title-deeds were in his possession. The property was afterwards mortgaged a third and a fourth time.

The Plaintiffs acted as the solicitors of *T. E. Eden*, and prepared the two mortgage deeds of the 13th of January and the 30th of March, 1868, to themselves.

The present action was brought by the Plaintiffs against *T. E. Eden*, who died during the progress of the suit, and against the first, third, and fourth mortgagees, asking to redeem the first mortgagee, and to foreclose the third and fourth mortgagees and the mortgagor. The Plaintiffs alleged that they were entitled to costs, charges, and expenses incurred as the solicitors of *T. E. Eden*, and claimed a lien on all deeds and documents in their possession in respect thereof.

At the hearing before Mr. Justice *Fry* the usual decree for redemption and foreclosure was made. When the minutes were being drawn up the Plaintiffs applied to the Registrar to insert in the decree a direction that an account should be taken of

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what was due to them for costs in respect of which they had a lien on the deeds and papers in their possession, and that if the third and fourth mortgagees and the representatives of the mortgagor should redeem the Plaintiffs under the decree without paying the amount certified to be due on taking such account, the said lien might not be prejudiced, nor the Plaintiffs ordered to deliver up the deeds and papers in their possession. The Registrar having refused to insert this direction, the Plaintiffs made an application to Mr. Justice *Fry* in Court to vary the minutes in the way proposed, but his Lordship declined to entertain the application, the question not having been considered at the hearing of the action. The Plaintiffs appealed from this decision.

Argument.

*Fischer*, Q.C., and *Whitehorne*, for the Appellants:—

We claim a lien on the mortgage deeds and all the documents connected with the mortgage security, such as abstracts, draughts, &c., not only for the costs of preparing the mortgage deeds, but generally for costs due to the Appellants from *Eden*: *Colmer* v. *Ede* (1). The mortgage deeds were drawn under *Eden's* instructions, and the Appellants are entitled to hold them against all the world till their costs are paid. It is contended by the Respondents that no lien could arise because the mortgage deeds were drawn by the Appellants for themselves, and were exclusively their property. But that is not the case. The Appellants had only a qualified property in the deeds as mortgagees; the mortgagor always had a contingent property in them, and if the loan had gone off, or if he had redeemed, they would have become his property altogether. He had therefore always such an interest in them as would support a lien in the solicitors.

*North*, Q.C., *Alexander*, and *Sangster Green*, for the Defendants, were not called on.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that this appeal must be dismissed. The deeds in question being mortgage deeds by which the client gave a charge on his property to his solicitors, never were the deeds of

(1) 40 L. J. (Ch.) 185.

the client; they were the solicitors' own deeds. They might have had a claim against their client as mortgagor for their preparation, but when the deeds were executed they became the deeds of the solicitors. A lien only attaches to documents which are the client's property; it cannot extend to what is the solicitors' own property.

BAGGALLAY, L.J.:—

Judgment, Baggallay, L.J.

I am of the same opinion. We have not seen the deeds; the case has been argued on the assumption that they are the mortgage deeds alone. Directly these deeds were executed they remained in the possession of the solicitors, not in their capacity of solicitors to the mortgagor, but as their own property as mortgagees. The property was in them, not in their client. They might have handed them over without his consent to another person as transferee of the mortgage, or as purchaser under their power of sale.

THESIGER, L.J.:—

Thesiger, L.J.

I am entirely of the same opinion. These deeds were in no sense the deeds of the mortgagor, but were the deeds of the mortgagees as such, and not in their possession as solicitors for the mortgagor. I may add that although there may be a contingent right of redemption in the mortgagor, it would be unreasonable to imply a lien from such a right, and reasonableness is the foundation of all the legal doctrine of lien.

Solicitor for the Plaintiffs: *F. Sheffield.*
Solicitors for the Defendants: *C. Blake; Benham & Tindell.*

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C. A.
*Dec.* 4.

## DAY *v.* BROWNRIGG.

[1878 D. 11.]

*Injunction—Assuming Name of House—Damage to Property—Demurrer—Damnum absque injuriâ.*

The Plaintiffs alleged in their statement of claim that their house had been called "*Ashford Lodge*" for sixty years, and the adjoining house belonging to the Defendant had been called "*Ashford Villa*" for forty years, and that the Defendant had recently altered the name of his house to that of the Plaintiffs' house. The Plaintiffs alleged that this act of the Defendant had caused them great inconvenience and annoyance, and had materially diminished the value of their property, and they claimed an injunction to restrain the Defendant from continuing to use the name of their house:—

*Held* (overruling the decision of *Malins*, V.C.), that the alleged act of the Defendant in calling his house by the name of the Plaintiffs' house was not a violation of any legal right of the Plaintiffs: and there being no allegation of malicious intention, a demurrer to the statement of claim was allowed.

*Semble*, no change has been made by the *Judicature Act*, 1873, s. 25, sub-s. 8, in the principle on which the Court grants injunctions.

Statement.

### DEMURRER.

The Plaintiffs in this action were *Thomas Day* and *Jane* his wife, and the Defendant was General *Brownrigg*. According to the allegations in the statement of claim, the trustees of the Plaintiffs' marriage settlement, in August, 1864, purchased as such trustees certain hereditaments and premises at *Ashford*, in *Middlesex*, called the *Ashford Lodge* estate, which were conveyed to the trustees upon the trusts of the settlement. The *Ashford Lodge* estate consisted of a large detached house with outbuildings and appurtenances, and sixteen acres of land. The Plaintiffs had ever since the purchase resided at the house. The house had, for sixty years previously, been called, by the successive owners thereof, and had been commonly known as, "*Ashford Lodge*," and by that name it had always been designated and described in all legal documents relating thereto. Shortly after the purchase of this estate the Defendant acquired from his father, and came into possession of, a small estate adjoining and in part bordering on the said *Ashford Lodge* estate, and the Defendant's estate consisted of

a villa and its appurtenances, and about nine acres of land. The said villa had always been called and known as "*The Villa, Ashford,*" or "*Ashford Villa,*" for the last forty years, and it had always been so described in the instruments of title relating thereto. In the course of the year 1876 the Defendant, for the first time, and without any justification therefor or right so to do, wrongfully, unlawfully, and improperly changed the name and designation of his villa and estate from that by which it had been called and known, and proceeded to call it "*Ashford Lodge,*" and the Defendant persisted in using such name, notwithstanding remonstrances by the Plaintiffs.

The statement then alleged that, by reason of such change of name, the Defendant had caused, and was constantly causing, considerable expense and damage, and extreme personal inconvenience and annoyance to the Plaintiffs, and such inconvenience and annoyance had greatly increased during the last year. The Defendant had thereby, as he well knew, damaged the means of identifying the house and estate of the Plaintiffs, and their title thereto; and the value of the Plaintiffs' estate had thereby been greatly decreased, and if the Defendant were allowed to continue to so call and style his house and estate, one of the means of identifying the Plaintiffs' house and estate would be totally destroyed, and their title would be rendered doubtful, and would be greatly injured, and the value of the same would be materially diminished. By reason of such acts and proceedings of the Defendant, the Defendant had slandered the title of the Plaintiffs to their house and estate, and had caused persons who had known the Plaintiffs' house by the name of *Ashford Lodge*, and now for the first time heard the name applied to the Defendant's house, to believe that the Defendant was the owner or occupier of the Plaintiffs' house, whereby great damage had accrued, and would accrue, to the Plaintiffs.

The Plaintiffs claimed that the Defendant might be restrained from styling or describing the villa and estate occupied by him as "*Ashford Lodge,*" and from advertising or publishing, or in any way holding out or representing, that "*Ashford Lodge*" was the name or designation of the said house occupied by the Defendant, or that he, the Defendant, was the owner of the house

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and estate belonging to and occupied by the Plaintiffs, and hitherto known as "*Ashford Lodge.*"

The Defendant demurred to this statement of claim. The demurrer came on to be heard on the 5th of November, 1878.

Argument.

*Glasse*, Q.C., and *Cozens-Hardy*, for the demurrer:—

First, we say that this case is too frivolous for the interference of the Court. There is no damage alleged on the claim for which the Plaintiffs could recover in an action at law. The only charge upon which any case can be founded is slander of title. If it is not that, it is nothing. But to substantiate a charge of slander of title it is essential that falsehood and malice should be charged and proved. There is no such charge here. In *Pater* v. *Baker* (1) Justice *Maule* said: "In slander of title it is essential, to give a cause of action, that the statement should be false. It is essential also that it should be malicious: not malicious in the worst sense, but with intent to injure the Plaintiff. . . . Unless he shews falsehood and malice and an injury to himself, the Plaintiff shews no case to go to the jury." In *Steward* v. *Young* (2) Justice *Byles* observed: "In slander of title two things must concur—the statement must be false and it must be malicious;" and the same view was expressed in *Brook* v. *Rawl* (3).

The only allegation is that the Defendant had changed the name of his house to that of the Plaintiffs, after it had been known by another name for forty years. That is no cause of action. A man is at perfect liberty to change the name of his house or his own name, and to adopt the name of his neighbour's house, or to take his neighbour's name. It is not a cause of action, and the utmost that can be said is that some inconvenience may possibly be caused to the Plaintiffs by the Defendant's conduct. The Court cannot restrain the publication of a libel, even if it is injurious to property. That was decided in *Prudential Assurance Company* v. *Knott* (4), notwithstanding it had been held otherwise in *Dixon* v. *Holden* (5), *Springhead Spinning Company* v. *Riley* (6), and *Saxby* v. *Easterbrook* (7).

(1) 3 C. B. 831, 868, 869.
(2) Law Rep. 5 C. P. 122.
(3) 4 Ex. 521.
(4) Law Rep. 10 Ch. 142.
(5) Ibid. 7 Eq. 488.
(6) Ibid. 6 Eq. 551.
(7) Law Rep. 7 Ex. 207.

*Higgins*, Q.C., and *Seward Brice*, in support of the Plaintiffs' claim:—

It is not necessary in a charge of slander of title to prove falsehood and malice. It is sufficient to state facts from which the Court may infer malice. We state facts sufficient to prove that the Defendant must be actuated by malice to act as he is doing. The course of practice now under Order XIX., rule 4, is merely to state the facts on which you rely, and then say you rely on slander of title, and if our facts are admitted the Court must imply malice.

It is not necessary in cases of slander of title to allege malice in the ordinary definition of the word. The meaning of malice, as laid down in *Ferguson* v. *Earl of Kinnoull* (1), is not confined to personal spite, but consists in a conscious violation of the law to the prejudice of another; and in *Bromage* v. *Prosser* (2) it is defined thus, "a wrongful act done intentionally without just cause or excuse." We say the Defendant had no excuse for doing this act. It is not necessary to put it higher than that. But we do not go solely upon slander of title, because we allege damage and injury to our property. We say that our house has been known as *Ashford Lodge* for sixty years, and the Defendant's house has been known for forty years up to 1876 as "*Ashford Villa*," and we say that in consequence of the Defendant having adopted the name of our house we have been caused considerable expense and trouble, and we have been materially injured and our property seriously damaged. There is quite sufficient stated upon this claim to shew injury and damage to property.

In such a case as this we have good ground of action. In *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (3), it was held to be actionable to make a false statement disparaging the quality of the Plaintiff's goods, from which special damage had resulted.

In numerous other cases the Court has restrained acts by which injury to property might arise: *Byron* v. *Johnston* (4), *Routh* v. *Webster* (5), *Maxwell* v. *Hogg* (6), *Braham* v. *Beachim* (7), and *Kerr* on Injunctions (8).

(1) 9 Cl. & F. 251.
(2) 4 B. & C. 247.
(3) Law Rep. 9 Ex. 218.
(4) 2 Mer. 29.
(5) 10 Beav. 561.
(6) Law Rep. 2 Ch. 307.
(7) 7 Ch. D. 848.
(8) Page 357.

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Even if the Court could not before the *Judicature Act* restrain the publication of a libel injurious to property, it can do so now: *Thorley's Food for Cattle Company* v. *Massam* (1); and in *Beddow* v. *Beddow* (2) the Master of the Rolls was of opinion that the jurisdiction of granting injunctions was now practically unlimited, and could be exercised in any case in which it was right or just to do so. An opinion to the same effect on the subject of libel was expressed by his Lordship in *Hinrichs* v. *Berndes*, before the Master of the Rolls on the 18th of January, 1878.

Judgment, V.-C. M.

MALINS, V.C.:—

In deciding the question raised upon this demurrer, I express no opinion as to what may be the ultimate result of the case if the parties have not the good sense to forbear carrying such a cause to a hearing. All I am now called upon to decide is whether, upon the allegations of this statement, the demurrer must be overruled or can be sustained.

By those allegations it appears that the Plaintiff, Mr. *Day*, acquired this property, called *Ashford Lodge*, at *Ashford*, in *Middlesex*, in the year 1864. It was conveyed to his trustee, and he, as *cestui que trust*, has been in possession of *Ashford Lodge* from 1864 downwards; but it has been known for a period of no less than sixty years by that name, "*Ashford Lodge*." It also appears that the Defendant acquired from his father an adjoining residence, which for forty years had been known as "*Ashford Villa*." Therefore the Defendant, in 1864, becoming the owner, and I suppose the occupier, of "*Ashford Villa*." There is Mr. *Day* occupying *Ashford Lodge*, and immediately adjoining and in part bordering on *Ashford Lodge* there is General *Brownrigg* occupying *Ashford Villa;* and why General *Brownrigg*, occupying a well-known residence, which had been the property of his father, and had been occupied and for many years known by the name of *Ashford Villa*, could not be as happy in that residence by the title of "*Ashford Villa*" as by the title of "*Ashford Lodge*," it is difficult to see. I suppose the word "villa" implies to the general public a rather small residence, and if this is a residence of considerable importance, I can well understand he would desire to change it from "villa" to something else. But when he found his

(1) 6 Ch. D. 582. (2) 9 Ch. D. 89.

neighbour already had possession for sixty years of *Ashford Lodge*, he must have known that by adopting the same title it must be inconvenient to himself and inconvenient to his neighbour, Mr. *Day*, because when two houses immediately contiguous to each other are called by the same name it must lead to inconvenience and to confusion, and inconvenience is damage. Therefore, if he wished to adopt a name which would imply a larger residence than "villa," why could not he call it "*Ashford House*," which may imply a residence of any size? However, he thought fit in 1876, for the first time, to call his house by the same name as his neighbour Mr. *Day* called his, and those who had been in possession before him had called it, for not less than sixty years. Now, that this was an inconvenience and an annoyance, and to a certain extent I am bound to say a damage, there can be no doubt whatever.

Under these circumstances I suggested originally that something should be done by which this unseemly dispute might be brought to an end, and I suggested yesterday that now even they had much better refer it to some common friend to say what ought to be done between them. That, I understand, the Plaintiffs are perfectly willing to accede to, but it is absolutely refused on the part of the Defendant. Therefore I have nothing to do but to decide the question between them as raised by this demurrer. Mr. *Glasse*, in his opening, submitted that the case was too frivolous for the interference of the Court. That I have not to decide now; what I have to decide is whether I am to allow or overrule this demurrer.

Now, has the Plaintiff or not sustained damage? The damage may be trifling, but I am very clearly of opinion that in the nature of things the very circumstances must lead to damage to some extent and annoyance to the last degree. You cannot come here to prevent an annoyance unless it amounts to something in the nature of destruction or interference with property. If a man makes an unseemly noise near his neighbour he can be restrained by the injunction of this Court. If he emits offensive smells by any process, the Court may stop that. Annoyance amounting to injury can be interfered with, but mere annoyance to taste cannot. This, however, is a thing which I am bound to say is wholly unjustifiable. I cannot imagine a more unneigh-

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Judgment, V.-C. M.

bourly act than that of General *Brownrigg*, in persisting to assume the name of his neighbour's house.

I have heard long arguments, and cases very interesting and very important, when necessary, have been appealed to. Although the doctrine of this Court as to the issuing of injunctions to stop libels was questioned at one time, I am bound to say that I consider there is no doubt about it now, after the decision in the case of *Byron* v. *Johnston* (1), which was cited; and even before the decision in that case, there can be no doubt that the jurisdiction which I exercised in *Dixon* v. *Holden* (2) was in strict accordance with the well-established rules of this Court. It was my conviction, is my conviction, and I believe will ever be so. However, it is not necessary to go into that question, for this is not a case of libel. It is said to be not wholly but partly a case of slander of title; but it is not necessary for me to decide the question of slander of title, because upon the demurrer it is sufficient if there is one good ground of relief.

Then, is there in this statement of claim anything which entitles the Plaintiff to relief? The Plaintiff says he has sustained damage. I have already expressed my opinion that there must be damage. It may be small, but he must, from the very nature of things, sustain some damage. At all events, the demurrer admits the fact that the course adopted by the Defendant has diminished and will diminish the value of the Plaintiff's property. Whether it be by means of slander of title or otherwise is perfectly immaterial. There is an admission by demurrer of the fact stated in the statement of claim, that the course adopted by the Defendant will greatly diminish the value of the Plaintiff's property. That is, therefore, a distinct allegation of injury and damage, and it being highly probable—almost certain, to my mind—that there must be damage to a certain extent, the consequence is that the demurrer must be overruled. I will not go into the numerous cases which have been cited on the subject of slander of title. I think they are beyond the point involved in this case. The course adopted by the Defendant is, in my opinion, most improper.

I express no opinion what may be the result when the facts are

(1) 2 Mer. 29. (2) Law Rep. 7 Eq. 488.

fully gone into, or whether Mr. *Glasse* may or may not be right in stating that the case is too frivolous for the interference of the Court. That will have to be decided hereafter if the parties will persist in going on with such a dispute. My duty is simply to overrule the demurrer.

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From this judgment the Defendant appealed. The appeal was heard on the 4th of December, 1878.

C. A.

*Glasse*, Q.C., and *Cozens-Hardy*, for the Appellant:—

Argument.

The Vice-Chancellor has rested his decision on the ground that actual damage is alleged in the statement of claim. But that is not enough without shewing that some legal right has been infringed. There must be *injuria* as well as *damnum*: *Prudential Assurance Company* v. *Knott* (1); *Fisher* v. *Apollinaris Company* (2). *Dixon* v. *Holden* (3), on which the Vice-Chancellor relied in his judgment, has been overruled. The case might have been different if fraud or a malicious intention had been alleged; but there is no element of that kind in the present case. There is no authority for the proposition that any man has an exclusive right to the name of his house. With respect to the charge of slander of title, there can be no slander of title without malice, which is not alleged.

*Seward*, *Brice* (*Higgins*, Q.C., with him), for the Plaintiffs:—

It is not necessary to allege malice in such a case as this. If the Plaintiff can shew wilful injury to his property, the Court will imply malice: *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (4). The right of a man to the exclusive use of the name of his house is analogous to the right to a trade-mark or trade-name. It is no objection to the present claim that it is now made for the first time. New cases must constantly occur calling for the interference of the Court, and the Court has a *quasi* legislative power to restrain new kinds of injury. The relief given in the case of trade-marks was once a new question, but it is now well established. If we shew actual injury to the

(1) Law Rep. 10 Ch. 142.
(2) Ibid. 297.
(3) Law Rep. 7 Eq. 488.
(4) Ibid. 9 Ex. 218.

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Plaintiffs' property it is sufficient to give us a claim to relief. The jurisdiction of the Court has been extended by the *Judicature Act*, 1873, s. 25, sub-s. 8, which enables the Court to grant an injunction whenever it is "just or convenient." It is not necessary to allege malice to sustain a charge of slander of title: *Bromage* v. *Prosser* (1); *Wren* v. *Weild* (2); *Steward* v. *Young* (3).

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

This is an appeal from the Vice-Chancellor *Malins*, who has held for the first time, as far as I am aware, and as far as the learned counsel in the case on both sides are aware, that a man has a legal right to the exclusive use of any name he chooses to affix to any part of his landed property, whether consisting of a house or land; for there is no distinction, as far as I can find. Such a right is not known to the law, and it has never been decided that there is such a right of property.

But it has been suggested to us by the learned counsel for the Respondent that this Court has a power of legislation, and that it would be a beneficial exercise of that supposed power of legislation to invent such a right. I disclaim the power of legislation which is asserted to exist in this Court, and I say that if such a right is to be created it must be created by the Legislature properly so called.

Independently of the right so alleged, I can find nothing in this statement of claim to give the right. It is not alleged in the statement of claim that the Defendant did this either maliciously or with intent to injure the Plaintiffs, or for any improper motive whatever. It only states the fact that he did it "without any justification therefor or right to do so," and that "he wrongfully, unlawfully, and improperly changed or caused to be changed the name." Of course those epithets, under the present system of pleading, are useless and redundant. They add nothing whatever to the Plaintiffs' case. They are merely now epithets of abuse. They were formerly in declarations essential, because under that form of pleading legal rights were stated for facts; but facts alone are stated now. The facts alleged in the present

(1) 4 B. & C. 247. (2) Law Rep. 4 Q. B. 213.
(3) Law Rep. 5 C. P. 122.

case come to this, that in the year 1876 the Defendant, "for the first time, without the assent of the Plaintiffs and without any justification therefor or right so to do, wrongfully, unlawfully, and improperly changed or caused to be changed the name and designation of his villa," which, as asserted in the claim, had theretofore been called "*Ashford Villa*," to "*Ashford Lodge*," the Plaintiffs having a house which had been for many years past called "*Ashford Lodge*." Then they go on to say that, "By reason of the change of name by the Defendant and his adoption of the name of the Plaintiffs' house and estate as the name and designation of his villa and estate, the Defendant has caused and is constantly causing, as he has well known, considerable expense and damage, and extreme personal inconvenience and annoyance to the Plaintiffs and to the visitors and other friends of the Plaintiffs." But it does not say any more than this, that it will be a consequence of the change. The claim does not even allege he intended to cause it, or, in fact, that there was any notion on his part that the change would cause it. Then the Plaintiffs go on to say that in addition to that, "the Defendant has thereby, as he well knows, damaged the means of identifying the house and estate of the Plaintiffs." That, again, is said to be a consequence of the change, but not a consequence anticipated by the Defendant; "and their title thereto and the value of the Plaintiffs' estate has thereby been greatly decreased; and if the Defendant shall be allowed to continue to so call and style his house and estate, one of the means of identifying the house and estate of the Plaintiffs will be totally destroyed, and their title thereto will be rendered doubtful and will be greatly injured, and the value of the same will be greatly diminished." That, no doubt, is rhetorical. It cannot be stated with any real intent that it should be taken as true. But, taking it as a fact, it is again a mere consequence, and certainly is not alleged to have been anticipated by the Defendant. Then the Plaintiffs say: "By reason of the acts and proceedings of the Defendant, the Defendant has slandered the title of the Plaintiffs,"—he has not technically slandered the title, that is admitted—"and he has represented to all persons who have known the Plaintiffs' house and estate by the name or style of "*Ashford Lodge*," and who now hear the name or style applied to the

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Defendant's villa and estate, and he has caused such persons to believe that the Defendant is the owner or occupier of the Plaintiffs' house and estate." That is all governed by this, "by reason of the said acts and proceedings." He does not allege independent proceedings and representations by him, except that he has changed the name, and there the matter ends.

The Vice-Chancellor came to the conclusion at which he has arrived, not upon the ground of slander of title, because that is not alleged, but upon the ground that the demurrer admits the fact that the course adopted by the Defendant has diminished and will diminish the value of the Plaintiffs' property. He said: "Whether it be by means of slander of title or otherwise is perfectly immaterial. There is an admission by demurrer of the fact stated in the statement of claim, that the course adopted by the Defendant will greatly diminish the value of the Plaintiffs' property. There is, therefore, a distinct allegation of injury and damage; and it being highly probable, almost certain, to my mind, that there must be damage to a certain extent, the consequence is that the demurrer must be overruled." With great deference to the learned Judge of the Court below, it appears to me that an allegation of damage alone will not do. You must have in our law injury as well as damage. The act of the Defendant, if lawful, may still cause a great deal of damage to the Plaintiff. If a man erects a wall on his own property and thereby destroys the view from the house of the Plaintiff, he may damage him to an enormous extent. He may destroy three-fourths of the value of the house, but still, if he has the right to erect the wall, the mere fact of thereby causing damage to the Plaintiff does not give the Plaintiff a right of action. You must have the two things, and I fail to find the first thing ascertained to exist even by the Vice-Chancellor. Slander of title is not made out. The right to appropriate a name by the Plaintiffs is not asserted in the judgment, nor is the right of the Defendant to appropriate the same name to his property denied. The Plaintiffs are quite at liberty to change the name of their estate if they think proper. They may call their house "*Ashford House*," or "*Ashford Hall*," or "*Ashford Castle*," if they please, or they may call it "*Old Ashford Lodge*," or "*The Original Ashford Lodge*," or anything else they like, but to say

that they have a right to use that name to the exclusion of all other of Her Majesty's subjects is, as I said before, admitted to be quite novel. No authority has been produced for it, and I can see no good reason for the allegation that such a right has so existed from time immemorial and is part of the customary or common law of the land. That being so, it seems to me the demurrer is well founded and that it ought to have been allowed.

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JAMES, L.J. :—

James, L.J.

I am entirely of the same opinion. It appears to me there is no damage alleged, there is no legal right alleged, the violation of which was the cause of damage. That being so, it is not for this Court to say that because somebody is doing something which it thinks not quite right, a thing which ought not to be done by one person to another, it should interfere. This Court can only interfere where there is an invasion of a legal or equitable right. No such legal or equitable right exists, in my view of this case, and therefore the demurrer ought to have been allowed. I think it right to add this, that it is not, in my opinion, proper, where, for the purpose of meeting a litigation, the Defendant is advised to stop the action *in limine* by demurrer—which he has not only a right to do, but which he ought to do, to diminish the costs of the litigation as much as possible—he should be exposed to reprehension, as if the allegations which are admitted to be true, for the purpose of decision upon demurrer, were true *de facto*. It is quite possible that they may be wholly or substantially fictitious.

THESIGER, L.J. :—

Thesiger, L.J.

I am entirely of the same opinion. It appears to me that the judgment appealed from is founded upon a misconception of the legal maxim that where there is a wrong there is a remedy. On the one hand, it appears to me that there is no legal right which has been invaded in this case. It is not contended now that the right which has been invaded is the title. In other words, it is not contended that the injury is one which comes within the definition of slander of title. On the other hand, it cannot reasonably be contended that this case stands upon the same footing as the cases

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of trade-marks, which undoubtedly stand upon a very peculiar footing. Therefore the only right which can be alleged is this, namely, that there is a right to the exclusive appropriation of the name here adopted in respect of any particular property. It seems to me there is neither principle nor authority in support of that contention. But, assuming for a moment that there is a legal right alleged, and one which might be invaded under such circumstances as would constitute a cause of action, still in this case there is no sufficient cause of action alleged. It is not alleged that the act done by the Defendant was done with the intention to injure the Plaintiff; it is not alleged that the act was done either fraudulently or maliciously. Assuming for the moment that the case could be put as high as a case of slander of title, then it is clear that in order to support an action for slander of title you would have to prove malice; it is true, as has been suggested on behalf of the Plaintiffs, that malice is implied by law where a wrongful act is done intentionally without lawful excuse. But in one way or another, either by the use of the term "maliciously" or by the use of some equivalent expression, the statement of claim or declaration, or whatever it may be, should shew that a well-founded cause of action is alleged. Here there is no such allegation. It has been said that the case of the *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (1), which was decided in the Exchequer, is some authority in support of the present action. I cannot see that that affords the smallest foundation for this action. That was a case in which there had been a statement made in writing disparaging a particular manufacture of the Plaintiffs, and in addition to that it was stated in distinct terms in the declaration which was demurred to, that the statement was made falsely and maliciously contriving to injure the Plaintiff. Mr. Baron *Bramwell*, in his judgment, commenting upon that, says, "So that it appears there was a statement published by the Defendants of the Plaintiffs' manufacture, which is comparatively disparaging of that manufacture, which is untrue so far as it disparages it, and which has been productive of special damage to the Plaintiffs; and it is stated that that publication was made falsely and maliciously, which possibly may mean nothing more than that it was made

(1) Law Rep. 9 Ex. 218, 221.

falsely and without reasonable cause, calling for a statement by the Defendants on the subject. But if actual malice is necessary —which I do not think is the case—the allegation is sufficient." The present case, as has been stated, is really one of first impression, and I cannot see any principle or foundation upon which the judgment of the Court below can properly be supported.

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JAMES, L.J.:—

I think it right to add that the power given to the Court by sect. 25, sub-sect. 8, of the *Judicature Act*, 1873, to grant an injunction in all cases in which it shall appear to the Court to be "just or convenient" to do so, does not in the least alter the principles on which the Court should act.

JESSEL, M.R.:—

It must be "just" as well as "convenient."

Leave to amend the statement of claim was refused.

Solicitors for Plaintiffs: *Boxall & Boxall.*
Solicitors for Defendant: *Wilson, Bristow, & Carpmael.*

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## *In re* DUCHESS OF WESTMINSTER SILVER LEAD ORE COMPANY.

C. A. 1878 Dec. 14, 16.

*Appeal—Rules of Court*, 1875, *Order* LVIII., *rr.* 2, 3—*Costs—Shorthand Notes of Evidence.*

*A.*, *B.*, and *C.* agreed with a company to take 1400 £1 shares, to be equally divided among them, in respect of which shares £310 had been paid generally. The company having been afterwards ordered to be wound up, an order was made putting *A.* on the list of contributories for 157 shares, *B.* for 466, and *C.* for 467. *A.* was put on the list for 157 shares only, because the Judge considered that under an arrangement between the parties the £310 was to be attributed to *A.'s* shares, so that 310 of them were fully paid up. *B.* appealed generally from this order, serving only the official liquidator. The Court of Appeal was of opinion that *B.* was properly put on the list, but that the £310 was attributable to all the 1400 shares.

*Held* (by *James* and *Baggallay* L.JJ., *dissentiente Thesiger*, L.J.), that a

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direction crediting *B.* with one-third of the £310 ought to be made, though there was now no opportunity of altering the order as against *A.*

The costs of shorthand notes of evidence in the Court below are not to be allowed as a matter of course upon an appeal, but only where a case is made for such allowance.

Statement.

THIS was an appeal by *William Walker* from an order of the Master of the Rolls, dated the 1st of August, 1878, directing that *Moses Walker* should be included in the list of contributories of the *Duchess of Westminster Silver Lead Ore Company* in respect of 157 shares, *William Walker* in respect of 466, and *Henry Walker* in respect of 467.

The capital of the company was £15,000 in 15,000 shares of £1 each. The facts appeared to be that *Henry Walker* verbally agreed to take 1400 shares on behalf of himself and his sons, *Moses Walker* and *William Walker,* to be equally divided between the three; that a few days afterwards *Henry Walker,* in the presence and with the concurrence of *Moses* and *William,* gave directions to the secretary that the shares should be allotted, 466 to *William,* 467 to *Henry,* and 467 to *Moses;* and the shares were entered in the books of the company accordingly and certificates for them given out. Before this occasion on which the three were present, *Henry Walker* had paid two sums of £200 and £110, making together £310, in respect of the shares. Subsequently a proposal was made by the *Walkers* that the shares should be cancelled and that 310 shares only should be issued to *Moses Walker* for the £310 which had been paid. This was accordingly done, but, as it appeared, without any authority.

An application by the official liquidator to place the three *Walkers* upon the list for 466, 467, and 467 shares respectively, having been adjourned into Court, it was found that upon the affidavits there was a complete conflict of testimony, *William Walker* denying his ever having agreed to take shares, and both *Moses* and *William* denying that they were present when the direction to allot the shares as above was given, and almost every material fact being in dispute. The Master of the Rolls therefore tried the case on oral evidence, and came to the conclusion that the direction by the father in the presence of the two sons to allot the shares as above among the three was established. His Lord-

ship was also of opinion that the cancellation of the shares was clearly invalid, but that nevertheless the £310 was to be treated as paid in respect of the shares allotted to *Moses Walker*, making 310 of his shares fully paid up, and leaving him liable only in respect of 167. The order was accordingly framed as above. *William Walker* gave notice of motion by way of appeal that so much of the order of the 1st of August, 1878, "whereby it was ordered that the said *William Walker* should be included in the list of contributories in respect of 466 shares, and that the said *William Walker* do pay to the official liquidator of the said company his costs of the said application in Chambers and of the adjournment thereof into Court, such costs to be taxed by the Taxing Master, may be discharged with costs or varied, or for such other order as to this honourable Court may seem just."

Statement.

*Marten*, Q.C., and *Yate Lee*, for the Appellant, contended on various grounds, which do not appear to call for a report, that *William Walker* could not be treated as a member; and that if he was a member in respect of one-third of the 1400 shares he ought to be credited with one-third of the £310 which had been paid in respect of them.

Argument.

*Ince*, Q.C., and *Lockwood*, for the official liquidator, were called upon on the latter point only:—

The notice of appeal does not raise this point, and if it was intended to raise it, notice of appeal ought to have been served on *Moses Walker:* Order LVIII., rule 3; so that the order might be set right. *Moses Walker* has been credited with the whole of this sum, and that cannot now be altered.

*Marten*, in reply:—

The appeal being against the whole order, it was not necessary that the notice should specify this ground of complaint. It is against the spirit of Order LVIII., rule 2, to require notices of appeal to be so specific. *William Walker* is entitled to be credited with one-third of the £310, and is not to lose this right because *Moses Walker* has received a benefit to which he is not entitled.

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Judgment, James, L.J.

JAMES, L.J.:—

We see no reason to disturb the decision of the Master of the Rolls that *William Walker* was fixed with a liability to take one-third of the 1400 shares, but we think that he was entitled in justice to be credited with one-third of the £310 which had been paid on them. He is fixed on the ground of one interview at which he agreed to take one-third of the 1400 shares in respect of which that sum had been paid. He had a right to say that that sum must be taken as paid in respect of all the shares, and nothing has been shewn which could have the effect of depriving him of that right. The whole matter has been reheard before us, and we must make the order which in our judgment the Master of the Rolls ought to have made. Has the Appellant lost his title to have that order set right? The application was made against him along with his father and brother, and he complains that his case was prejudiced by being mixed up with theirs. We have not given much weight to that consideration, but it is the right of the Appellant to have his case tried by itself. The other brother has been allowed credit for the whole £310, and has thus gained a benefit of which he cannot be deprived, since the time for appeal has passed; but that is the official liquidator's own fault. The Appellant gave his notice of appeal in due course against the whole order, and was not bound to give specific notice that he desired the order to be set right in such a particular as this. The order of the Master of the Rolls will, therefore, be varied by giving the Appellant credit for one-third of the £310; but this will not affect the costs of the appeal, which must be paid by him.

Baggallay, L.J.

BAGGALLAY, L.J.:—

The questions are, what order ought originally to have been made, and whether, having regard to the way in which the matter is brought before the Court of Appeal, the Appellant is entitled to have the variation which he asks for made in the order. I agree with the Master of the Rolls that the Appellant was bound by a concluded agreement to take one-third of the 1400 shares, but I also think that he was entitled to have credit for one-third of the £310. Then as to the way in which the matter is brought

before the Court of Appeal; the Appellant appeals from the whole order and asks that it may be discharged or varied. This is wide enough to include such a variation as the giving him credit for one-third of the £310; the rights of the Appellant cannot be affected by the circumstance that *Moses Walker* has obtained something that he was not entitled to, and that it is too late to deprive him of it.

THESIGER, L.J.:—

Judgment, Thesiger, L.J.

I agree in holding that the Appellant is liable as a contributory in respect of the 466 shares; but as to the subsidiary point, I am unable to agree with the other members of the Court. I admit that each of the three contributories was fully entitled to have his case treated separately, and that on this appeal we can only look at the evidence as far as it affects this particular Appellant: but in considering whether we ought to interfere with the order of the Master of the Rolls, we must look at the position of the parties. Each party set up that he was not a shareholder, except that *Moses Walker* admitted himself to be the holder of 310 shares on which £310 had been paid. The Master of the Rolls seems to have treated the parties as bound *inter se* by the arrangement entered into by them when the attempted cancellation took place, though the arrangement was in other respects invalid. I think that he was hardly justified in doing so, and that he ought rather to have held that all parties were remitted to their original position. The point appears not to have been fully argued before the Master of the Rolls, but only touched on; still, if the appeal had been properly instituted, and all parties interested in it had been here, I think that the point might have been raised here. One order was drawn up in which the three cases are dealt with together, and the Court therefore purported to do justice between all parties, and I cannot think that the question whether the £310 was properly dealt with is raised by this notice of appeal, which only seems to raise the question whether the Appellant is a contributory, and does not bring here all the parties interested in the question whether he is entitled to be credited with any part of the £310, which is an entirely separate question. According to Order LVIII., rule 2, the notice of appeal where part of an order is

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complained of must specify such part, and it appears to me that the Appellant ought in this case to have specified that he appealed as to no part of the £310 being allowed him, and ought to have served the other parties.

*Ince*, Q.C., asked that the costs of the shorthand notes of the evidence below might be allowed.

*Marten*, Q.C., opposed.

JAMES, L.J.:—

I am of opinion that shorthand notes of the evidence ought not to be allowed as a matter of course, but only when a case is made for allowing them. Here no such case is made.

BAGGALLAY, L.J.:—

I am of the same opinion.

THESIGER, L.J.:—

In the Common Law Divisions we have always been in the habit of using the Judge's notes, and shorthand notes cannot be generally necessary.

Solicitors: *Le Riche & Son; Layton & Jaques.*

## *Ex parte* COOPER. *In re* BAUM.

C. A. 1878 Dec. 12, 19, 21.

*Bill of Sale—Registration—Inventory of Goods with Receipt for Purchase-money attached—Act of Bankruptcy—Assignment of whole Property to secure pre-existing Debt—Equivalent—Forbearance by Grantee to enforce Judgment—Failure to prove alleged Fraud—Costs—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 87.

An inventory of goods with receipt for purchase-money attached, the vendor remaining in apparent possession of the goods, is a bill of sale within the meaning of the *Bills of Sale Act*, 1854, and requires registration.

*Allsopp* v. *Day* (1) distinguished.

*Byerley* v. *Prevost* (2) disapproved.

A trader on the 28th of August executed a bill of sale of substantially the whole of his property to secure a debt for which the grantee had recovered judgment on the 3rd of July, and another debt which he owed the grantee. The grantor had on the 4th of July written a letter to the grantee, undertaking, in the event of his not issuing execution on the judgment, to execute to him on demand a bill of sale to secure the judgment debt and such other sums as he owed him. The grantee did not enter into any agreement not to enforce the judgment, but in fact he did not issue execution. On the 29th of August another creditor levied execution at the grantor's place of business, and on the 1st of September the grantor filed a liquidation petition. He had between the 4th of July and the 29th of August received by the carrying on of his business sums amounting to £10,000:—

*Held*, that no equivalent had been given for the bill of sale, and that it was void as against the trustee in the liquidation.

*Woodhouse* v. *Murray* (3) followed.

*Philps* v. *Hornstedt* (4) disapproved.

An Appellant who had failed in proving allegations of fraud, as to which he had adduced a mass of evidence, but who had succeeded on a point of law, was deprived of his costs.

Statement.

IN this case there were two appeals from two orders made by Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

### FIRST APPEAL.

The facts relating to the first appeal were as follows:—

*John Baum* was the proprietor of *Cremorne Gardens*, of which he held a lease, and at which he carried on the business of a licensed victualler and theatrical proprietor. His private residence

(1) 7 H. & N. 457.
(2) Law Rep. 6 C. P. 144.
(3) Law Rep. 2 Q. B. 634; Ibid. 4 Q. B. 27.
(4) 1 Ex. D. 62.

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was at No. 2, *Clyde Street, South Kensington.* On the 26th of May, 1876, he sold the furniture in his dwelling-house to Mr. *Alexander Isaacs* for £600, and signed a receipt for the purchase-money at the foot of an inventory of the goods. On the outside cover of the inventory was written, "Inventory of the furniture, fixtures, and effects in No. 2, *Clyde Street, South Kensington,* the property of *John Baum,* Esq., purchased by Mr. *Alexander Isaacs.*" The inventory was headed:—

"Inventory of fixtures, furniture, and effects at No. 2, *Clyde Street, South Kensington.* The property of *John Baum,* Esq. Taken this 6th day of May, 1876."

Then followed an enumeration of the different articles in each room of the house, and at the foot of it was this receipt:—

"Received this 26th day of May, 1876, of and from Mr. *Alexander Isaacs,* the sum of £600, being the amount of purchase-money in respect of the goods, chattels, plate, linen, and effects mentioned in the foregoing inventory.

"(Signed) *John Baum.*

"Witness:

"(Signed) *W. H. Roberts,* Solicitor."

The purchase-money was paid. The deed was not registered as a bill of sale, and the property remained in the apparent possession of *Baum* until after he had, on the 1st of September, 1876, filed a liquidation petition. On the 29th of September his creditors resolved to accept a composition of 1*s.* in the pound. The resolution was confirmed and was registered, but the registration was subsequently vacated by the Court, on the ground that the assenting creditors had not acted *bonâ fide* in passing it. On the 5th of December, 1876, the registration not having been then vacated, *Isaacs* executed a deed of gift of the goods comprised in the inventory to a Miss *Crouch,* who was living with *Baum* and passing as his wife. After the registration had been vacated a fresh first meeting of the creditors was summoned, and a liquidation by arrangement was resolved upon. The trustee in the liquidation applied to the Court to set aside the sale of the furniture on the ground of conspiracy and actual fraud, and also on the ground that the inventory and receipt ought to have been regis-

tered as a bill of sale. There was some evidence that before the 26th of May there had been negotiations between *Baum* and *Isaacs* respecting the purchase, and that *Isaacs* had given *Baum* £50 on account. Also that on the 26th of May possession of the goods was given to *Isaacs* by *Baum* delivering him a chair in the name of the whole, and that *Isaacs* verbally agreed to let the goods to *Baum* at a weekly rent. A great mass of evidence was adduced as to the alleged fraud. The Registrar held that the fraud had not been proved, and he held, on the authority of *Allsopp* v. *Day* (1) and *Byerley* v. *Prevost* (2), that the document of the 26th of May did not require registration. And he dismissed the trustee's application with costs. The trustee appealed.

SECOND APPEAL.

The additional facts relating to the second appeal were as follows:—

On the 3rd of July, 1876, Messrs. *A. & H. Isaacs* recovered judgment against *Baum* for £1436 5*s.* 9*d.*, debt and costs. On the 4th of July he wrote a letter to them as follows:—"I undertake, in the event of your not issuing execution upon the judgment you have obtained against me for £1436 5*s.* 9*d.*, to execute to you on demand a mortgage of my furniture, fixtures, and effects at *Cremorne* for that amount and such other sums as I owe you." Execution was not issued on the judgment. On the 5th of August, 1876, the solicitor of Messrs. *Isaacs* wrote to *Baum* as follows:—"As you are aware, my clients, Messrs. *Isaacs*, have a judgment against you for upwards of £1400, and are in a position to issue execution. I must therefore ask you at once either to pay the amount or give Messrs. *Isaacs* such security as I may approve." On the 28th of August, 1870, *Baum* executed a bill of sale in favour of Messrs. *Isaacs*. This deed contained a recital of the judgment debt of £1436 5*s.* 9*d.*, and a recital that *Baum* was also indebted to Messrs. *Isaacs*, for moneys lent and advanced and for goods sold and delivered by them to him, in the further sum of £1545 3*s.* 3*d.*, making together £2981 9*s.*; that Messrs. *Isaacs*, at the request of *Baum*, agreed to withhold execution under their judgment on his giving his undertaking to execute to them a bill

(1) 7 H. & N. 457. (2) Law Rep. 6 C. P. 144.

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Statement.

of sale of his goods, fixtures, fittings, property, chattels, effects, and premises thereinafter mentioned, for the whole amount in which he was indebted to them, whenever required by them so to do; and that Messrs. *Isaacs* had demanded payment of the judgment debt, or that *Baum* should execute such bill of sale as aforesaid, and *Baum* had accordingly agreed, in pursuance of his undertaking, to execute the assignment thereinafter contained. And it was witnessed that, in pursuance of such agreement, and in consideration of the sum of £2981 9*s.* so due to Messrs. *Isaacs*, *Baum* did thereby assign to Messrs. *Isaacs* all and singular the goods, fixtures, stock-in-trade, chattels, theatrical property, scenery, plate, linen, horses, carriages, harness, and effects in and about the hotel, theatre, and gardens called *Cremorne*, to hold the same to Messrs. *Isaacs*, subject nevertheless to the proviso for redemption thereinafter contained, (that is to say) Provided, nevertheless, that in case *Baum* should upon demand in writing by Messrs. *Isaacs*, or without such demand, pay unto them the sum of £2981 9*s.*, with interest, then and in such case the assignment thereby made should cease and be void. Provided also that in case *Baum*, upon such demand for payment being made, should neglect or fail to make such payment accordingly, then and in such case, and at any time thereafter, it should be lawful for Messrs. *Isaacs* to take possession of the property assigned, and to sell it and repay themselves the amount due to them. On the 29th of August a creditor named *Leader* put in an execution at *Cremorne Gardens*. The trustee applied to the Court for a declaration that the bill of sale was fraudulent and void as against him. There was evidence that from the 4th of July to the 29th of August *Baum* had received as much as £10,000 for gate-money, *i.e.*, payments made by visitors for entrance to the gardens. The Registrar refused the application. The trustee appealed.

FIRST APPEAL.

Argument.

*Swanston*, Q.C., *Winslow*, Q.C., and *Nicholson*, for the Appellant:—

On the evidence the Registrar ought to have come to the conclusion that the charges of conspiracy and fraud had been proved.

As to the question of registration, the judgments of this Court in the recent case of *Ex parte Odell* (1) shew that *Allsopp* v. *Day* (2) was wrongly decided; and *Byerley* v. *Prevost* (3) and similar cases have simply followed *Allsopp* v. *Day*. At that time it had not been held, as it has been since, that equitable assignments are within the *Bills of Sale Act*. There was no agreement for the sale to *Isaacs* before the inventory and receipt were signed; before that there had been nothing beyond negotiation, nothing more than that *quasi* preliminary agreement which there always is where negotiation has proceeded so far that the parties instruct a solicitor to prepare an agreement. The property in the goods passed by the instrument, and it ought to have been registered; and as the goods clearly remained in the apparent possession of *Baum* when the petition was filed, inasmuch as they were in the possession of Miss *Crouch* who passed as his wife, the trustee is entitled to them. In *Phillips* v. *Gibbons* (4) it was held that an instrument which recited a sale of goods must be registered as a bill of sale, there being no other evidence of a sale. In *Brantom* v. *Griffits* (5), *Cockburn*, C.J., said: "Here there is an agreement to sell and purchase, amounting to a transfer *in præsenti*, which is a bill of sale."

[THESIGER, L.J.:—In *Thomson* v. *Barrett* (6) the question left to the jury was whether the receipt was a mere receipt, or whether it was intended to be a record of the transaction.]

Here the document was meant to be a record of the transaction.

*E. C. Willis*, and *Herbert Reed*, for *Isaacs*:—

[JAMES, L.J.:—You need not argue the question of fraud. We cannot differ on that point from the Registrar, who saw the witnesses, there being only the evidence of the debtor to prove the fraud, while it is denied by *Isaacs* and his solicitor. We cannot believe the debtor without disbelieving them.]

Except for the charge of fraud, *Isaacs* ought not to have been

(1) *Ante*, p. 76.
(2) 7 H. & N. 457.
(3) Law Rep. 6 C. P. 144.
(4) 5 W. R. 527.
(5) 2 C. P. D. 212.
(6) 1 L. T. (N.S.) 268.

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made a Respondent. He made over his interest to Miss *Crouch* while the composition resolutions were standing. By force of these resolutions the debtor had become master of his property again, and *Isaacs* transferred the goods to Miss *Crouch* without notice of any act of bankruptcy then available for adjudication against *Baum*.

[JAMES, L.J.:—The act of bankruptcy remained available for adjudication, though no adjudication could be made so long as the composition resolutions stood.]

Before the trustee made any application to the Court, *Isaacs* had in examination stated that he claimed no interest in the goods. In *Ex parte Hoare* (1) a debtor had, while composition resolutions were in force, executed a mortgage of part of his property, the mortgagee having notice of the liquidation petition under which the resolutions had been passed. The debtor failed to pay the composition and was afterwards adjudicated a bankrupt, the act of bankruptcy being the filing of the petition, and it was held by the Chief Judge that the mortgage was valid as against the trustee in the bankruptcy.

[JAMES, L.J.:—There the composition was valid, though it afterwards failed through the default of the debtor; here the registration was vacated because the composition resolutions were not validly passed. *Isaacs* never had any title to the property.]

The principle is analogous to that which governs sales in market overt of goods obtained by fraud: *Cundy* v. *Lindsay* (2); *Horwood* v. *Smith* (3). In *In re Kearley and Clayton's Contract* (4) it was held that a purchaser from a compounding debtor is not entitled to require evidence that the instalments of the composition have been paid. As to the question of registration, *Ex parte Odell* (5) was quite a different case, and it did not overrule *Allsopp* v. *Day* (6). In the present case there was an actual delivery of the goods which gave a legal title to the purchaser; no other title was required. The principle of *Allsopp* v. *Day* applies. The fact that £50 had been previously paid on account

(1) Law Rep. 16 Eq. 625.
(2) 3 App. Cas. 459.
(3) 2 T. R. 750.
(4) 7 Ch. D. 615.
(5) *Ante*, p. 76.
(6) 7 H. & N. 457.

shews that there was an antecedent bargain. A mere receipt for purchase-money need not be registered as a bill of sale: *Hale* v. *Saloon Omnibus Company* (1). An agreement to execute a bill of sale does not require registration as a bill of sale unless it is relied upon as an equitable assignment: *Ex parte Mackay* (2); *Ex parte Homan* (3); *Brantom* v. *Griffits* (4). Here we rely for our title simply on the delivery of possession; not on the document, which is merely evidence of payment of the purchase-money. If the transaction was complete without any record, the fact that a record was made could make no difference; it would be mere surplusage.

[JAMES, L.J.:—That might be said of every bill of sale.]

Generally, possession is not given at the time of execution. In the new *Bills of Sale Act* (41 & 42 Vict. c. 31), which is to come into operation on the 1st of January, 1879, sect. 4 expressly provides that the term "bill of sale" shall include "inventories of goods with receipt thereto attached." That shews that it was not supposed that they are included in the Act of 1854. In *Evans* v. *Prothero* (5), it was only held that a document purporting to be a receipt might be evidence of a contract to purchase, not that it was the contract. If this document requires registration as an agreement, it would follow that wherever there is an invoice of goods with a receipt for the purchase-money added to it, evidence cannot be adduced to shew that the goods were not all delivered to the purchaser. *Byerley* v. *Prevost* (6) is a stronger case than *Allsopp* v. *Day* (7). And in *Graham* v. *Wilcockson* (8) some traders sold goods to their landlord under an arrangement by which the purchase-money was to be applied in payment of their rent which was in arrear. A memorandum of the sale was drawn up, and the goods were delivered to the landlord and then let by him to one of the vendors. It was held that the memorandum did not require registration as a bill of sale.

[THESIGER, L.J.:—That is a very strong case, but it was really founded on *Byerley* v. *Prevost*.]

(1) 4 Drew. 492.
(2) Law Rep. 8 Ch. 643.
(3) Ibid. 12 Eq. 598.
(4) 2 C. P. D. 212.
(5) 1 D. M. & G. 572.
(6) Law Rep. 6 C. P. 144.
(7) 7 H. & N. 457.
(8) 46 L. J. (Ex.) 55.

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*E. C. Willis*, and *F. C. Willis*, for Miss *Crouch*.

*Swanston*, in reply :—

*Isaacs* is a necessary party independently of the case of fraud. He remained owner of the goods from the 26th of May to the 5th of December, and then he transferred them *pendente lite*, with notice of the act of bankruptcy. Any one who takes a bill of sale must be prepared within twelve months afterwards to defend his title. If any of the goods were disposed of while *Isaacs* remained the owner, he is responsible for their value. *Edwards* v. *Edwards* (1) is a clear authority that an equitable assignment must be registered as a bill of sale. In *Allsopp* v. *Day* (2), and most of the other cases relied upon by the Respondent, the sale had been made before the document was signed.

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Judgment.

Dec. 21. JAMES, L.J., delivered the judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.) as follows :—

The question is, whether the document of the 26th of May was or was not a bill of sale or assurance of personal chattels requiring registration under the *Bills of Sale Act*. If it did require registration, there is no doubt that that possession was not taken which was necessary to give effect to the title of Mr. *Alexander Isaacs*, the Respondent. The document in question, which is now before me, has on the outside of it this, which we consider to be part of the document itself, "Inventory of fixtures, furniture, and effects at No. 2 *Clyde Street*, *South Kensington*, the property of *John Baum*, Esq., purchased by Mr. *Alexander Isaacs*." Then inside there is a detailed inventory of all the furniture, followed by this: "Received this 26th day of May, 1876, of and from Mr. *Alexander Isaacs*, the sum of £600, being the amount of purchase-money in respect of the goods, chattels, plate, linen, and effects mentioned in the foregoing inventory." And this was signed by *John Baum*, and witnessed by *W. H. Roberts*, the solicitor who was present at the transaction. Now it appears to us that that document is as complete an "assurance" of the goods contained

(1) 2 Ch. D. 291, 297. (2) 7 H. & N. 457.

in it, and would be as effectual to give the title to and the right to possession of them for all purposes whatsoever, as if it had been extended in any amount of conveyancing language, engrossed on any number of skins of parchment, and sealed with any quantity of sealing-wax. It is a document which does assure the goods and does transfer them from the one person to the other. However, the difficulty suggested was this. It was said that such a conclusion would run counter to a series of decisions beginning with *Hale* v. *Saloon Omnibus Company* (1), before Vice-Chancellor *Kindersley*, and to the principle of *Allsopp* v. *Day* (2) and other cases which have followed it, in which a receipt for purchase-money referring to property comprised in an inventory has been held not to be a bill of sale. In the recent case of *Ex parte Odell* (3), two members of this Court expressed doubts as to the correctness of the decision in *Allsopp* v. *Day*. We do not, however, on the present occasion, think it necessary to go into any minute examination of *Allsopp* v. *Day*. There was this apparent distinction between that case and the present, that there the two documents, the inventory and the receipt, were not written on the same piece of paper, and did not together form the title to the property. The title was made out by means of parol evidence connecting the receipt with the inventory which was referred to in a letter containing the receipt. Nor is it necessary to criticise the other cases which followed *Allsopp* v. *Day*, because, so far as regards the general law, those cases have been entirely swept away by the new *Bills of Sale Act* (41 & 42 Vict. c. 31), which comes into operation on the 1st of January next, and by sect. 4 of which the Legislature have, either by way of declaration or by way of new enactment, expressly included "inventories of goods with receipt thereto attached" under the general definition of bills of sale. Though I do not think it necessary to go further into those cases, yet if, as has been pressed upon us in argument, the logical sequence of them is that such a document as the one before us is not an "assurance" requiring registration, we should be compelled to express our dissent from them, or at least our inability to follow the logical sequence with regard to this particular document. If such a

(1) 4 Drew. 492. (2) 7 H. & N. 457.
(3) *Ante*, p. 76.

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document as this is to be held not to be an assurance requiring registration under the Act, the result would be to make the Act a mere plaything for verbal ingenuity active in exerting itself in the omission or in the introduction of immaterial words. We should, in fact, by a judicial decision establish a precedent for all persons how they could make a perfect and effectual bill of sale and yet not be subject to the provisions of the *Bills of Sale Act*. As to this particular document, I take it as it stands to be a bill of sale or assurance requiring registration, and therefore the title of Mr. *Isaacs* fails upon that ground. But this was only one of the points raised by the appeal; it is a mere point of law, and might have been taken in the Court below without any great expense. Therefore we do not think it right, having regard to the nature of the other point which was also fought before the Registrar, to interfere with his order as to the costs before him. And, as that point was also insisted upon before us and has failed, we think that we ought to allow the appeal without costs.

SECOND APPEAL.

Argument.

*Swanston*, Q.C., *Winslow*, Q.C., and *Nicholson*, for the Appellant:—

The bill of sale was in effect an assignment of all the grantor's property to secure a pre-existing debt; the money taken at the gates was really included in it, for if the grantees had taken possession of what was expressly assigned, either no one would have paid for entrance into the gardens, or the grantees would have themselves received the payments. The true test of the validity of such an assignment by a trader is whether the deed gives the grantee power to stop the grantor from carrying on his business. The forbearance of the grantees to issue execution upon their judgment was not a sufficient equivalent for the assignment. They did not bind themselves not to do so. And if they had issued execution and the goods had been sold, that would have been an act of bankruptcy: *Bankruptcy Act*, 1869, s. 6; and the other creditors could, under sect. 87, have intercepted the proceeds of sale. *Woodhouse* v. *Murray* (1) is a clear authority that the forbearance

(1) Law Rep. 2 Q. B. 634; Ibid. 4 Q. B. 27.

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to issue execution was not a sufficient equivalent. If *Philps* v. *Hornstedt* (1) is not distinguishable, it is inconsistent with *Woodhouse* v. *Murray* (2). When there is no stipulation to make further advances, the fact that further advances have been made after the execution of the assignment will not support it: *Lindon* v. *Sharp* (3); *Bittlestone* v. *Cooke* (4).

*E. C. Willis*, and *Herbert Reed*, for Messrs. *Isaacs*:—

The present case is very different from *Woodhouse* v. *Murray*. There an execution which had been put in was withdrawn, and an assignment was made to the execution creditor of the goods which had been seized, and which comprised the whole of the grantor's property. The execution was an inchoate act of bankruptcy. Moreover, the grantor had ceased to carry on his business, and the forbearance of the grantee could not benefit the creditors. It is not the necessary result of an execution to give the property seized to the creditors; a bankruptcy or liquidation petition must be presented within fourteen days: *Bankruptcy Act*, 1869, s. 87; *Ex parte Villars* (5). The giving of time to the grantor was a sufficient equivalent for the assignment. In *Philps* v. *Hornstedt* only seven days' time was given, and it was held to be a sufficient equivalent. There was a reasonable expectation that *Baum* would be able to carry on his business, as indeed he did for nearly two months after the letter of the 4th of July was written. The bill of sale was given pursuant to the agreement contained in that letter. If the agreement was unilateral, still *Baum* in fact received a large sum of money in consequence of the forbearance of the grantees. A mere verbal agreement to make further advances followed by actual advances is enough: *Ex parte Winder* (6). The deed must be treated as if it had been executed on the 4th of July: *Mercer* v. *Peterson* (7); *Harris* v. *Rickett* (8).

(1) Law Rep. 8 Ex. 26; 1 Ex. D. 62.
(2) Law Rep. 2 Q. B. 634; Ibid. 4 Q. B. 27.
(3) 6 Man. & G. 895.
(4) 6 E. & B. 296.
(5) Law Rep. 9 Ch. 432.
(6) 1 Ch. D. 290, 560.
(7) Law Rep. 2 Ex. 304; Ibid. 3 Ex. 105.
(8) 4 H. & N. 1.

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JAMES, L.J. :—

I am really unable to distinguish this case from *Woodhouse* v. *Murray* (1). A person who has obtained a judgment, and has a right to levy execution, makes a bargain with his debtor, who says, "If you do not put in an execution, or if you do not go on with your execution, I will give you a bill of sale." There was no binding agreement to give up the judgment or the execution, and if there had been, it would make no difference whatever, because unless the decision in *Woodhouse* v. *Murray* is law, it seems to me that the provisions of sect. 87 would be rendered perfectly nugatory; anybody could laugh at them. Any debtor might say to a creditor "Do not sue me for such a number of days, or do not issue execution against me; if you will be kind enough, or if you will be forbearing, I will take care to let you know in good time, and I will give you a bill of sale of the whole of my property." A bill of sale comprising the whole property of the debtor is to be supported, because the creditor has given him time. As I said during the argument, I have scarcely ever known a case of the kind in which the bill of sale was not given upon an understanding, which was afterwards acted upon, that time should be given, because otherwise what equivalent would the grantor get for it? The whole thing would be a useless expense. The very object is that the grantor shall continue in possession of the property, and shall have some time, and very often the time is mentioned. Probably the bill of sale is given contemporaneously with a bill of exchange, or something of that sort, but that circumstance has never been held to take the case out of the operation of the universal rule in bankruptcy, that where a man assigns the whole of his property in consideration of a past debt, that is a fraud upon the bankruptcy law, and therefore void. There is apparently some little inconsistency between the two decisions of the Exchequer Chamber, though the two cases were very different; but I very much prefer the decision in *Woodhouse* v. *Murray*, which commends itself to my sense and to my notion of the law, and is the decision which I should myself have given if the case had come before me for the first time. The appeal will be allowed.

(1) Law Rep. 2 Q. B. 634; Ibid. 4 Q. B. 27.

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BAGGALLAY, L.J.:—

Judgment, Baggallay, L.J.

I am entirely of the same opinion. It could not be contended under the circumstances of this case that the bill of sale of the 28th of August was not an act of bankruptcy, unless there was what has been properly called an "equivalent" for it. I entirely assent to what has fallen from the Lord Justice *James* with reference to *Woodhouse* v. *Murray* (1). I think the principle of that case is exactly applicable to the present. I will only observe with regard to *Philps* v. *Hornstedt* (2), that the Court was of opinion upon the facts that there had been that which did amount to an "equivalent" for the bill of sale, and on that ground the judgment can be supported. If it is in conflict with *Woodhouse* v. *Murray*, the latter appears to me to be more in accordance with the law which is applicable.

THESIGER, L.J.:—

Thesiger, L.J.

I also am of opinion that the present case is entirely undistinguishable from *Woodhouse* v. *Murray*. There the consideration for the deed which was alleged to be an act of bankruptcy was the withdrawal of an execution. There that which is here suggested on behalf of the Respondents was found as a fact by the jury, viz., that the deed was executed with the honest and *bonâ fide* intention of preventing the expense and the sacrifice of property which would have resulted from the creditor's retaining possession of the goods and enforcing by a sale his rights under his judgment and execution. But, notwithstanding that finding of the jury, the Court held that the deed constituted an act of bankruptcy. It is said, however, in order to distinguish that case from this, that in *Woodhouse* v. *Murray* there had been a seizure under the execution, and therefore an inchoate act of bankruptcy. But I cannot trace in the considered judgment of the Court of Exchequer Chamber anything to shew that they decided the case upon that narrow ground. What they did base their decision upon was this, that, inasmuch as an execution for more than £50 might, if it was proceeded with, result in bankruptcy, any agreement by which the

(1) Law Rep. 2 Q. B. 634; Ibid. 4 Q. B. 27.
(2) Law Rep. 8 Ex. 26; 1 Ex. D. 62.

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whole of the debtor's property is given up in consideration of the execution being withdrawn is an act of bankruptcy, and cannot be supported in the event of bankruptcy taking place. But it is said that *Philps* v. *Hornstedt* (1) (which was also a decision of the Exchequer Chamber) is contrary to the view taken in *Woodhouse* v. *Murray* (2), and is at all events an authority in favour of the Respondents. It is very difficult to distinguish the two cases, but if they cannot be distinguished, *Philps* v. *Hornstedt* is clearly contrary to the principle of *Woodhouse* v. *Murray*, and, that being so, and both of them being decisions of a Court of co-ordinate jurisdiction with our own, I prefer to follow that decision, which is founded upon facts almost identical with those of the present case, to that which proceeded upon very different facts.

I wish to make one other observation. It is suggested that not only was there an arrangement by which profit might be obtained to the estate of the bankrupt, but that he did obtain that profit to a very large amount subsequently to the date of the original agreement, under which it is alleged that the execution was not put in force. I find that the same thing existed in *Lindon* v. *Sharp* (3). There, not only was there an expectation that further advances would be made, but after the agreement between the parties advances to a considerable extent were made. But, notwithstanding that fact, it was held that, inasmuch as there was not any binding agreement that advances should be made (just as here there was no binding arrangement which would have prevented the execution being issued almost the very next day after the agreement had been entered into), the advances actually made, although they had in fact profited the bankrupt, were not sufficient to prevent the deed from constituting an act of bankruptcy.

Solicitors for Appellant: *Evans & Eagles.*
Solicitor for Respondents: *W. H. Roberts.*

(1) Law Rep. 8 Ex. 26; 1 Ex. D. 62.
(2) Law Rep. 2 Q. B. 634; Ibid. 4 Q. B. 27. (3) 6 Man. & G. 895.

## FLOWER *v.* LLOYD.

[1877 F. 109.]

C. A.
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V.-C. B.
*Nov.* 22, 23, 26, 29, 30.
C. A.
*Dec.* 2, 3.
1879
*Jan.* 11.

*Action to impeach Judgment as obtained by Fraud.*

The Plaintiffs brought an action against the Defendants to restrain alleged infringements of a patent process for printing on metal plates. The Plaintiffs printed from dry lithographic stones put into relief. The Defendants alleged that they the Defendants printed by the ordinary damp lithographic process from flat stones. Pending the proceedings, an order was made by the Court of Appeal that an expert named by the Plaintiffs and not objected to by the Defendants, should be at liberty to inspect the Defendants' process, and the Defendants gave an undertaking to shew him the whole process. The inspector examined the process, and was shewn twenty-seven stones used by the Defendants, and reported to the effect that the Defendants' mode of printing was the same as the ordinary process of lithography, except that tin was used instead of paper. The action being tried on these materials was ultimately dismissed by the Court of Appeal. The Plaintiffs shortly afterwards commenced an action to have it declared that the judgment on the appeal had been obtained by fraud, and for consequential relief. The alleged fraud was that the Defendants, when the inspection took place, had in use not only the above twenty-seven stones, but also stones on which the designs were placed in relief—that they removed such latter stones from the place where the inspection took place, in order to conceal from the inspector the fact that they had stones on which the design was in relief—that they falsely stated to the inspector that they had no other stones than those shewn to him—and that the Defendants stated to the inspector that the ink used by them was ordinary lithographic ink, whereas in fact they used ink specially prepared for the Plaintiffs' use by a particular manufacturer for printing by the dry process. *Bacon*, V.C., considered the case of fraud proved, and made a decree in the Plaintiffs' favour, but the Court of Appeal was of opinion that no fraud was proved, and dismissed the action.

*Per James* and *Thesiger*, L.JJ., *dissentiente Baggallay*, L.J.:—*Semble*, that an action to impeach a judgment on such grounds was not maintainable.

Statement.

THIS was an action to have it declared that the judgment in a former action between the same parties had been obtained by fraud, and for relief consequent on that declaration.

In the former action the Plaintiffs sought an injunction and damages for an alleged infringement of letters patent of 1864 and 1869, for improved methods of printing and decorating metal plates. Vice-Chancellor *Bacon* gave judgment for the Plaintiffs, but on the 18th of May, 1877, this judgment was reversed by the

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Court of Appeal, and the action dismissed with costs. In the course of the proceedings an inspection of the Defendants' process took place under an order of the Court of Appeal, and the fraud alleged in the present action was that the Defendants wilfully and with corrupt intention deceived and misled the inspector. The Vice-Chancellor considered this to be established, and on the 20th of February, 1878, gave judgment in the present action, declaring that the judgment of the 18th of May, 1877, had been obtained by fraud, and ordering that all further proceedings to enforce that judgment should be stayed, and that the Defendants should pay the costs of the present action.

The process expressed to be protected by the patent of 1864 was considered by the Court to be the printing by the dry process from a lithographic stone put into sufficient relief to enable the dry process to be used and the impressions to be worked off rapidly. The case made by the Defendants was that they the Defendants printed by the ordinary process of lithographic printing, viz., the damp process, in which the stone is not put into relief, but is wetted, which prevents the ink from adhering to those parts of it which are not covered by the pattern, and that the printing on metal plates from damp stones was not novel in 1864.

The Plaintiffs contended that the process patented by them in 1869 was a combination of four subordinate processes, namely, printing, drying, varnishing, and again drying, that the Defendants had adopted the last three of these processes, and that the damp process of printing from a flat stone was a mere colourable imitation of the first process, which was printing from a dry stone put in relief.

The Plaintiffs, after joining issue in the action, obtained an order from the Vice-Chancellor authorizing them with their manager and a skilled witness to inspect and examine the Defendants' process. The Defendants appealed, and an order was made that Mr. *Imray* and Mr. *Carpmael*, two skilled persons named by the Plaintiffs and not objected to by the Defendants, should inspect the Defendants' process, the Defendants by their counsel giving an undertaking to shew the whole process.

Mr. *Carpmael* was unable to attend, and the inspection was

made by Mr. *Imray* alone. On the 10th of July, 1876, he made a report stating that at the Defendants' works he was shewn three presses, two of which were at work; that the matrix used in them was the ordinary lithographic stone with the design drawn upon it in thick black ink; that the stones were flat except the almost inappreciable thickness of the ink, so that when an inking roller was passed over them in a dry state it inked the whole surface of the stone. He further stated that he had examined all the lithographic stones shewn to him to the number of twenty-seven, and found them to be the same as those in the presses, and was told that there were no other forms or matrixes of any kind used in the establishment, and that the ink used was ordinary lithographic ink thinned down in the usual way by varnish, both ink and varnish being supplied by a person named *Winstone*. He described the way in which the tin plates when printed were dried, varnished, and again dried, and stated that he was informed by the persons present that he had witnessed the complete process, and that he saw no reason to doubt the truth of that representation. At the trial, in answer to a question by the Defendants' counsel, he said that the Defendants' process of printing was the same as the ordinary process of lithographing on paper, except that tin was used instead of paper.

At the trial Vice-Chancellor *Bacon* adopted the Plaintiffs' contention that their process consisted of four subordinate processes, of which the Defendants had adopted the latter three, and used a colourable variation of the first, his Lordship being of opinion that the Defendants had not made out that printing from damp stones on metal plates was not novel in 1864. Judgment was accordingly given for the Plaintiffs, but this judgment was reversed by the Court of Appeal, and the bill dismissed with costs. An application to have the appeal reheard upon further evidence was afterwards refused (1).

On the 14th of July, 1877, the Plaintiffs commenced the present action, on the ground of fraud alleged to have been committed by the Defendants in connection with Mr. *Imray's* inspection. The case made was that at the time of the inspection the Defendants had in their possession not only the twenty-seven lithographic stones which

(1) 6 Ch. D. 297.

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were shewn to him and which were referred to in his report, but also a large number of other stones on which the designs were placed in relief by the spaces being eaten out with acid, and that prior to Mr. *Imray's* visit the Defendants, with the object of concealing such last-mentioned stones from his inspection, removed them from the portion of their premises which alone was inspected by him, and further, that they purposely deceived and misled him by telling him that no stones, forms, or matrixes of any kind were used by them for decorating plates other than the twenty-seven stones which were shewn to him; that instead of the ink used by the Defendants being ordinary ink supplied by *Winstone*, they had been in the constant habit for some time previously to the commencement of the former action of obtaining ink from a manufacturer named *Storr*, who prepared ink specially for the Plaintiffs; that such ink was supplied in vessels to each of which was attached a label having printed thereon in large letters the words "prepared expressly for direct printing on tin," and that prior to the inspection the Defendants carefully removed the labels from all such vessels with the object of concealing from Mr. *Imray* the falsehood of the representation that the ink used by them was ordinary lithographic ink prepared by *Winstone;* and the Plaintiffs charged that the Court of Appeal as well as Mr. *Imray* were deceived and misled by such fraudulent conduct of the Defendants.

The Defendants admitted that at the time of the inspection they had a number of stones other than the twenty-seven which were shewn to Mr. *Imray*, and that shortly before his visit such stones were removed from the portion of the premises where his inspection took place; but they denied that any fraud was intended in such removal, and stated that the twenty-seven stones which were shewn to Mr. *Imray* fairly and fully represented the nature and state of preparation of every stone used in their establishment. That all the stones removed (except one which was included by accident) bore on them the names or some other indication of their customers, and that their only purpose in removing the stones was to prevent the disclosure to the Plaintiffs of the names of their customers, from which they apprehended serious injury to their business. They denied having stated to Mr. *Imray* that no other

stones than the twenty-seven were used in their business, and they said the statement made was that they had no stones of any kind different from those, and they also denied having made any false statement about the ink used by them.

The Vice-Chancellor considered the fraud established, and made an order to the effect stated above.

The Defendants appealed, and the appeal came on for hearing on the 22nd of November, 1878.

Argument.

Sir *H. Jackson*, Q.C., *Marriott*, Q.C., *Seeley*, and *De Castro*, for the Appellants, entered into an examination of the evidence, and contended that no case of fraudulent concealment on the part of the Defendants was made out.

*Kay*, Q.C., *Aston*, Q.C., and *Macrory*, for the Plaintiffs:—

Where any fraud or surprise upon the Court is proved, the Court will set aside a decree and remit the parties to their rights: *Richmond* v. *Tayleur* (1); *Kennedy* v. *Daly* (2); *Brooke* v. *Lord Mostyn* (3). A fraud of this kind is committed when a person whose duty it is to put proper materials before the Court does not do so. The material part of the process is the putting the design into relief, and here stones which were in relief were removed, and a false statement made as to the ink with the intention of concealing the true nature of the process used.

Sir *H. Jackson*, in reply:—

The Court will not set aside a decree and remit parties to their rights merely because there has been a suppression of something which had better have been disclosed, unless the fact suppressed is of vital importance or the suppression has been made with a fraudulent intent. I admit that the withdrawal of the stones was imprudent, and if the Defendants had asked my opinion I should have advised them to shew every stone they had; but there was no fraudulent intent, and the non-production of stones which had a somewhat greater degree of relief, produced accidentally by user, than the stones which were exhibited is not material, it being

10 Jur. N.S. 554, 1114.

(1) 1 P. Wms. 734, 736.
(2) 1 Sch. & Lef. 355, 374.
(3) 33 Beav. 457; 2 D. J. & S. 373; Law Rep. 4 H. L. 304.

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clear on the evidence that these stones were not put into relief so as to be adapted to printing by the dry process.

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Jan. 11, 1879. BAGGALLAY, L.J., delivered the judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.), and after entering into a careful examination of the evidence and stating the reasons of the Court for coming to the conclusion that the evidence of a witness who stated that one of the Defendants had directed him to remove the stones before Mr. *Imray's* inspection, as it would not do to let him see any stones so deeply indented, was not to be credited; that the use of *Storr's* ink had been discontinued before the inspection—that it was not established that the Defendants had stated to Mr. *Imray* that no other stones than the twenty-seven were used by them—and that although some of the stones which had been removed were in relief according to the ordinary meaning of the term, *i.e.*, in a relief which could be appreciated by the touch or by the eye, they were what would be called "lithographically flat," a term used to denote a stone which, though put into slight relief by the repeated use of the acid employed in cleaning the stones, is for the practical purposes of lithography a flat stone, concluded as follows:—

It only remains for us to say that having very carefully examined the evidence which has been brought under our consideration, we have arrived at the following conclusions viz. that the charges of fraud made by the Plaintiffs against the Defendants have not been substantiated; that the orders given by the Defendants previously to Mr. *Imray's* first inspection, for the removal of the stones which were not produced to him, were not given for the purpose of concealing any part of the process which they had actually used or were then actually using, but with the sole object, as stated by them, of preventing the names of their customers becoming known to the Plaintiffs; that the whole of the Defendants' process was fairly and fully shewn to Mr. *Imray* on his first and subsequent inspections in 1876; that his description of such process in his report was perfectly accurate; that the Defendants have never decorated metal plates by any other process than that so described, which is the ordinary damp lithographic process; that the stones

which were removed in no respect differed in character or nature of preparation from those which Mr. *Imray* first saw, though, under the circumstances to which we have adverted, some of them had been put in more relief than others by reason of their having been more often etched or cleaned; that if every stone which had been removed had been produced to Mr. *Imray* and examined by him on the 10th of July, 1876, though his report might have been varied in terms it could not with propriety have been to any other effect in substance, and that the judgment of the Court of Appeal of the 18th of May, 1877, a stay of proceedings under which has been ordered by the Vice-Chancellor, must have been equally adverse to the Plaintiffs.

Under these circumstances the judgment of the Vice-Chancellor must be reversed, and judgment given in favour of the Defendants, with the usual consequences as to costs.

JAMES, L.J.:—

I have to add some observations which have been seen by the Lord Justice *Thesiger* and in which he concurs. We have thought it right and due to the Defendants to go through the allegations made against them; and their counsel, in fact, scarcely asked for any judgment except one based on their acquittal of the fraud charged against them. But we must not forget that there is a very grave general question of far more importance than the question between the parties to these suits. Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the Plaintiffs had sustained on this appeal the judgment in their

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favour, the present Defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately *ad infinitum*. There is no distinction in principle between the old Common Law action and the old Chancery suit, and the Court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely; but, in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds.

BAGGALLAY, L.J.:—

With reference to the observations which have just been made by the Lord Justice, I only wish to state that, whilst I am fully sensible of the evils and inconveniences which must arise from re-opening what are apparently final judgments between litigant parties, I desire to reserve for myself an opportunity of fully considering the question how, having regard to general principles and authority, it will be proper to deal with cases, if and when any such shall arise, in which it shall be clearly proved that a judgment has been obtained by the fraud of one of the parties, which judgment, but for such fraud, would have been in favour of the other party. I should much regret to feel myself compelled to hold that the Court had no power to deprive the successful but fraudulent party of the advantages to be derived from what he had so obtained by fraud.

Solicitors: *W. & J. Flower & Nussey; G. & K. Fisher.*

## *In re* STOCKTON IRON FURNACE COMPANY.

C. A.
1873
V.-C. B.
Dec. 5.

C. A.
1879
Jan. 22, 29.

*Mortgagor and Mortgagee—Attornment Clause—Judicature Act*, 1873, s. 10—*Bills of Sale Act* (17 & 18 *Vict. c.* 36)—*Appeal from Order in Winding-up—Amending Notice of Appeal—Rules of Court*, 1875, *Order* LVIII., *rr.* 3, 4.

A limited company gave, in 1875, a mortgage to its bankers for its account current, by covenant to surrender its copyhold works, and by the mortgage deed the company became tenant to the bankers at the rent of £5000. No surrender of the copyholds was made. On the 16th of July, 1877, the bankers sent an auctioneer to distrain for £10,000, being two years' rent. The auctioneer, on the same day, saw the managing director of the company, gave him formal notice of distraint, and by arrangement with him employed two workmen of the company to keep possession of the chattels distrained. On the 18th of July the company requested the bankers not to proceed to an immediate sale, to which the bankers assented, and the two men remained in possession. On the 19th of July a petition was presented for winding up the company; and on the 28th of July a winding-up order was made. By arrangement with the liquidator, the men went out of possession in October, and in November the bulk of the chattels was sold by the liquidator without prejudice to the rights of the bankers, and realized less than £5000:—

*Held*, by *Bacon*, V.C., that under the *Judicature Act*, 1873, s. 10, the rights of the parties were the same as in bankruptcy; that the attornment clause was intended to give the mortgagees a remedy in the event of bankruptcy, and was a fraud on the bankrupt laws; that, moreover, a seizure by a secured creditor by a distress not perfected by sale before the bankruptcy was void as against the general body of creditors; and that the proceeds of sale belonged to the liquidator:

*Held*, further, that the case came within the doctrine of reputed ownership.

*Held*, on appeal, that the attornment clause created the relation of landlord and tenant; that there being no ground for saying that the rent of £5000 was so unreasonable as to be fraudulent, the mortgagees had the same rights of distress as any other landlord; and that, as the value of the chattels sold was less than one year's rent, on the mortgagees abandoning all claim to the chattels remaining unsold, the proceeds of sale must go to them.

*Ex parte Williams* (1) distinguished.

*Held*, also, that the doctrine of reputed ownership had no application, as a distress does not make the landlord the owner of the goods distrained.

*Semble*, that where a mortgage contains an attornment clause the mortgagee is liable to wilful default in respect of the rent as being in possession.

*Held*, that the order of the Vice-Chancellor was not an interlocutory

(1) 7 Ch. D. 138.

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order; and that the proper notice of appeal was a fourteen days' notice; but a four days' notice having been given, the Court allowed it to be amended.

The Court of Appeal has full discretion, under Rules of Court, 1875, Order LVIII., rule 3, to allow a notice of appeal to be amended as to dates or otherwise, and special circumstances are not required to justify such amendment.

Statement.

BY an indenture of mortgage dated the 23rd of February, 1875, and made between the *Stockton Iron Furnace Company, Limited*, of the one part, and *Edmund Backhouse* and five other persons, who carried on business as bankers at *Darlington* under the firm of *Jonathan Backhouse & Co.*, of the other part, in order to secure the balance of the company's account with the bankers to an amount not exceeding £50,000, the company covenanted with the parties of the second part to surrender certain parcels of copyhold land on which their works were carried on, "and also all the works, buildings, and erections now erected or being on the said pieces or parcels of ground, and also all such engines, furnaces, fixed machinery, implements, and utensils in, upon, or belonging to the said several pieces or parcels of land, buildings, and premises respectively, or any of them, or any part thereof, as are affixed to the inheritance of the said copyhold premises and are of the nature of real estate," to the use of the parties of the second part and their heirs, subject to a condition for making void the surrender corresponding with the proviso for redemption hereinafter contained. The proviso for redemption was, that if the company or their assigns should, on demand by the parties of the second part, or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, made to the company or their assigns, or without such demand having been made, pay to the parties of the second part all moneys which might for the time being be owing by the company or their assigns on their account current with the bank or otherwise for the bills and notes discounted and paid, and for other loans, credits, or advances made to or for the accommodation or at the request of the company or their assigns, and for interest commission, and other lawful charges, together with (in the case of such demand as aforesaid having been made) interest on the balance due from the day of such demand having been made till the actual payment thereof

at the rate of £ per cent. per annum, the parties of the second part would reconvey the premises "thereinbefore assigned, or intended so to be," to the company or their assigns. The deed contained no assignment of any chattels. It contained a covenant for payment on demand of the balance of the account with interest; a covenant not to pull down or remove the buildings, furnaces, steam-engines, boilers, fixtures, machinery, implements, utensils, or other the premises thereinbefore assigned, without the permission of the mortgagees; and an agreement that "all furnaces, engines, fixed machinery, and implements which shall be erected, placed, or used upon the said premises hereinbefore covenanted to be surrendered, or any part thereof," during the continuance of the security, either in lieu of or in addition to "any buildings, furnaces, engines, machinery, and implements now standing or being there," should be included in the security. There was a power enabling the mortgagees at any time thereafter to sell "the said premises hereinbefore expressed to be assigned and covenanted to be surrendered respectively," with a stipulation that the power should not be exercised until default in payment for one calendar month after notice, with the usual clause exonerating purchasers from seeing that notice had been given. It was declared that the deed was intended to be a security for the balance for the time being owing on the account current of the company, or their assigns, with the bank, by whatsoever persons the business of the bank might for the time being be carried on; and that the total amount of money to be recoverable under the deed should not exceed £50,000.

The deed also contained the following clause:—

"And this indenture further witnesseth, that in pursuance of the said recited agreement, and for the consideration aforesaid, the said company do hereby attorn and become tenants from year to year to the said persons parties hereto of the second part, their heirs and assigns, for or in respect of the said mortgaged premises, at the yearly rent of five thousand pounds clear of all deductions, to be paid by equal half-yearly payments on the twenty-third day of August and the twenty-third day of February in every year, the first half-yearly payment thereof to be made on the twenty-third day of August next: Provided always, and it is

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hereby declared, that it shall be lawful for the said persons parties hereto of the second part, their heirs and assigns, at any time after the said twenty-third day of August next, without giving previous notice of their intention so to do, to enter upon and take possession of the hereditaments and premises whereof the said company have attorned and become tenants as aforesaid, and to determine the tenancy created by the aforesaid attornment, and put out and expel the said company from the said hereditaments and premises without any ejectment or other legal process as effectually as any sheriff might do in case the landlords had obtained judgment in ejectment for recovery of such possession, and a writ *habere facias possessionem* had issued on such judgment directed to such sheriff; and in case of such entry and any action brought, the defendants or defendant may plead leave and license in bar thereof, and this indenture may be used as conclusive evidence of the leave and license of the said company."

The deed was not registered under the *Bills of Sale Act*, 1854, nor was any surrender of the copyholds made.

On the 13th of July, 1877, the directors of the company issued a circular to their customers and creditors, stating that they were compelled to suspend payment; and on the same day notices were given by the company to their workmen that their services would not be required at the expiration of a fortnight.

On the 14th of July, 1877, which was Saturday, a writ was served on the company, on behalf of *John Fleming*, a creditor of the company, whose debt was stated by him to amount to £6273 11*s.* 5*d.*

On the 16th of July, 1877, *Joseph Bradley*, an auctioneer, received from the solicitors of the bank authority to distrain for £10,000, being two years' rent under the attornment. On the same day *Bradley* went to Mr. *Byers*, the managing director of the company at the works, and informed him that he (*Bradley*) had come to distrain, and must keep a man constantly in possession; and being, as he stated, of opinion that it was desirable that the men placed in possession should be men who were usually employed about machinery and ironworks, he asked Mr. *Byers* whether there were any trustworthy men on the works whom he could engage for that purpose. Mr. *Byers* recommended two men,

*Lloyd* and *Ramsey*. *Bradley* thereupon gave formal notice of distraint to Mr. *Byers*, and engaged *Lloyd* and *Ramsey* to be in possession, and told them, as he said, to remain in possession on behalf of Messrs. *Backhouse & Co.* till further order. It was disputed, however, whether he told them on whose behalf they were to keep possession, and they continued to work for and receive wages from the company. He at the same time gave to them the distress warrant in a closed envelope, and told them that if anybody asked for their authority they were to shew it to them, and refer them to him (*Bradley*) for anything further. The men accordingly remained in possession, one by day and the other by night, until the 6th of October.

On the 18th of July Mr. *Byers*, by the direction of the board of directors, wrote to the bankers, asking them not to proceed at once to a sale, but to keep possession without prejudice to any of their powers or remedies under the mortgage.

The firm of solicitors who instructed *Bradley* were at that time acting for both the company and the bankers, and *Bradley's* appointment as bailiff was in all respects regular.

On the 19th of July a petition was presented for the winding-up of the company, and an injunction was obtained restraining *Fleming* from execution; and on the 28th of July following a compulsory order was made. On the 2nd of August following *James Eddy* was appointed official liquidator. In October an arrangement was come to between the bank and the liquidator that in order to save expense the men should be withdrawn from possession, the liquidator undertaking that the rights of the bank should not thereby be prejudiced, and on the 6th of October they went out of possession, leaving the chattels in the hands of the liquidator.

In November, 1877, parts of the loose material and plant on the premises were sold, without prejudice to any question, and the proceeds, amounting to £4533 17*s.* 1*d.*, were paid into Messrs. *Backhouse's* bank to a separate account.

On the 17th of May, 1878, the solicitors of the bank gave notice to the liquidator that the bank would, after the 22nd of that month, appropriate the £4533 17*s.* 1*d.* in their hands towards payment of their claim, which was admitted to exceed £20,000.

On the 22nd of May Mr. *Fleming*, who had obtained leave to

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attend proceedings, as representing the unsecured creditors, gave notice to the liquidator that he claimed, on behalf of the unsecured creditors, all effects on the property which were not fixtures passing by the mortgage deed.

Statement.

The liquidator, having no assets in hand, hesitated about taking any proceedings, but ultimately, by the direction of the Judge in Chambers, he took out a summons, which was served on the bank and *Fleming*, to shew cause why the sum of £4533 17*s.* 1*d.* should not be paid to the liquidator, and also to shew cause why the undisposed of portion of the movable plant and fixtures should not be forthwith sold by the liquidator for the benefit of the creditors.

The only question of fact in dispute, except a question as to what *Bradley* said to *Lloyd* and *Ramsey* when he put them in possession, was as to the value of the ironworks at the date of the mortgage. Five witnesses on behalf of the bankers said that in 1875 £5000 was "a fair rent" for the property. Four witnesses on behalf of Mr. *Fleming* deposed that, owing to the depreciation in that kind of business which had been going on since 1874, they believed there would have been, in 1875, great difficulty in letting the premises for £2500 a year.

The summons came on for hearing before Vice-Chancellor *Bacon* on the 5th of December, 1878.

Argument.

*Phear* and *Cree*, for the official liquidator.

*Hemming*, Q.C., and *Romer*, for *Fleming*:—

Supposing this had been a bankruptcy instead of a winding-up, the seizure under this so-called distress could not have stood: *Ex parte Williams* (1). In the words of Lord Justice *James* (2), it would have been "an attempt to defeat the operation of the bankruptcy laws, which cannot succeed."

Then comes the question whether this is a rule of bankruptcy which is to prevail in the winding-up of a company under the 10th section of the *Judicature Act*, 1875 (38 & 39 Vict. c. 77). We say it is such a rule.

The decision of the Master of the Rolls in *In re Printing and*

(1) 7 Ch. D. 138. (2) 7 Ch. D. 143.

*Numerical Registering Company* (1) has an important bearing. By deciding that the bankruptcy rule, whereby an execution creditor for more than £50 loses the benefit of his judgment if the sheriff gets notice of bankruptcy within fourteen days after a sale, is to prevail and be observed in a winding-up, his Lordship really extended the application of the 10th section beyond what is asked for here, for he applied it not only to import a section of the bankruptcy Act, but to give relief analogous to but not covered by the terms of that section. The real question is, whether the generality of the words of the 10th section, which cover all questions as to the respective rights of secured and unsecured creditors, has been restricted by decision. Mr. *Fleming* is an unsecured creditor, whereas the bank are secured creditors, and therefore we are within the general words of the 10th section.

At first the decisions on the 10th section of the Act of 1873 were narrow: *In re Albion Steel and Wire Company* (2), and the authorities there referred to. But the decision of *In re Printing and Numerical Registering Company* shews a wider construction, and is authority for saying that on any question between secured and unsecured creditors the rights in a winding-up are the same as in bankruptcy.

Then was the distress a legal distress? Mr. *Bradley* is instructed by the company's solicitors; he is accompanied on his errand by the company's managing director; he selects two of the company's men, paid by the company, tells them they are to hold possession, without (as we say) saying for whom, and he gives them a sealed envelope which they do not open. Can there be a doubt that the object of the transaction was to make things as pleasant as possible; to attempt to make the thing a substantial transaction if the company really became insolvent, and to render it a nullity if not?

Our evidence is that the rent was excessive, as it plainly was in *Ex parte Williams* (3), and the consequences there pointed out must follow.

The object of inserting the clause is plain; if the winding-up order should be made, it was to operate; if not, it was to have no application. In other words, the object was to evade publicity,

(1) 8 Ch. D. 535. (2) 7 Ch. D. 547, 550.
(3) 7 Ch. D. 138.

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Argument.

and defeat the provisions of the *Bills of Sale Act*: *Ex parte Hooman* (1); *Ex parte Jay* (2).

[BACON, V.C.:—I do not think the liquidator is one of the persons against whom the *Bills of Sale Act* takes effect: *In re Marine Mansions Company* (3).]

That was before the *Judicature Act* had imported the bankruptcy law into winding-up proceedings.

An attornment clause does not enable the mortgagee to repay himself any of the capital advanced: *Hampson* v. *Fellows* (4); and a distress by a creditor against a company in liquidation under supervision is void: *In re Traders' North Staffordshire Carrying Company* (5). The last-mentioned authority applies, because the mortgagees here would come and ask the Court for leave to perfect the distress. They are not in the simple position of outside creditors.

Sir *H. Jackson*, Q.C., and *B. B. Rogers*, for Messrs. *Backhouse*, the mortgagees:—

This deed is not a bill of sale, and the official liquidator is not in the position of a trustee in bankruptcy. The only question between us is one of value—of the amount of rent. The clause is in the most ordinary form to be found in all the collections of conveyancing precedents. The distress was perfectly regular, and the sale was not a sale under an execution, but under a distress.

The Master of the Rolls in *In re Printing and Numerical Registering Company* (6) certainly departed from his previous view as to the extent of range of the 10th section of the *Judicature Act*, 1875. An *obiter dictum* in *In re Printing and Numerical Registering Company* cannot disturb the former judgment.

It is sufficient, in order to distinguish this case from *Ex parte Williams* (7), that this is an ordinary deed in common form, and that here the rent is fair and moderate.

We do not want the aid of the bankrupt law, but if we were in

(1) Law Rep. 10 Eq. 63.
(2) Ibid. 9 Ch. 697.
(3) Ibid. 4 Eq. 601, 610.
(4) Law Rep. 6 Eq. 575.
(5) Ibid. 19 Eq. 60.
(6) 8 Ch. D. 535.
(7) 7 Ch. D. 138.

bankruptcy, the 34th section of the Act of 1869 would give us one year's rent: *Ex parte Hill* (1).

*Hampson* v. *Fellows* (2) was decided on demurrer under very special circumstances.

*Morton* v. *Woods* (3) is a direct authority that "a mortgage including chattels, with a power ultimately to take possession or distrain," is not a bill of sale within the Act. *Kelly*, C.B., observes that "no such doctrine can be supported."

*Hemming*, in reply.

Judgment, V.-C. B.

BACON, V.C., after some preliminary observations, continued:—

The law stands plainly upon the *Judicature Act* of 1875. [His Lordship read the 10th section, and continued:—]

What does that mean? It means that, when a winding-up shall happen, the estate to be administered—for that is the thing in which secured and unsecured creditors are interested—shall be dealt with according to the law of bankruptcy.

The summons before me presents this proposition:—When the winding-up order was made, or rather when the petition was presented—for that is the time at which the liquidator's title begins—there was a distress for rent, but nothing was done upon that distress after the expiration of the five days, from and after which it might have been realized by sale. Nothing was done, and nothing has been done since, except what has been done by mutual consent, so as not to alter the rights of the parties. I have to deal with the rights of the creditors, unsecured and secured, as they were on the day when the petition was presented. At that time this distress had been levied, on the authority of a deed which in one respect is an ordinary mortgage deed, but which contains in it also the attornment clause that, in default of due payment of the interest, the mortgagees shall have a right, founded upon the attornment which the mortgagors make to them, to distrain for rent. That is to say, having security upon all the immovable property, which would include the fixtures, they are to have the right to distrain upon the movable chattels for

(1) 6 Ch. D. 63. (2) Law Rep. 6 Eq. 575.
(3) Law Rep. 4 Q. B. 293, 307.

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the sum mentioned in the attornment clause, to the amount of £5000 a year.

I do not think it is of any importance, or that I need dwell upon the question which has been raised, whether that was a fair rent or not. From the description which has been given to me in evidence, I should doubt whether there was anything unfair in the stipulation of £5000 a year as the rent of these premises. But when I look at the deed, I ask myself, To what end could this proviso have been inserted in a mortgage deed, unless it was to avoid the provisions of the *Bills of Sale Act*, and to provide for the mortgagees a remedy which, when insolvency happened, they could put in force?

In *Ex parte Williams* (1) the thing was a little more patent, because there, by the covenant of the mortgagees, they engaged that they would leave the mortgagor in quiet possession unless bankruptcy should happen, and then followed a most innocent and unobjectionable attornment clause. The Lords Justices, upon considering that deed, were satisfied that the original purpose was to give to the mortgagees a security equivalent to that which a bill of sale would have given them if it had been registered, and that it was given to provide against the accident of bankruptcy. If I am asked to consider this deed, and to consider the relations between the bankers and this company, I cannot doubt that that was the real intention of the parties here—not fraudulent except in the sense in which that word is applied to transactions which come to be overhauled in bankruptcy—but that it was the very object and intention of the parties that while the interest was duly paid, the bankers should be content to take their interest, and that if that failed to be paid, then that they should have power to take the chattels not assigned to them, under the power of distress, and so pay themselves at the rate of £5000 a year. I do not think it signifies very much whether £5000 a year was the amount of the interest, or whether it exceeded that amount greatly; because if the stipulation is entered into between the parties they are to be bound by it. If that is against the law of debtor and creditor, then it is invalid. The Lords Justices, in the case which has been referred to, came to the conclusion that

(1) 7 Ch. D. 138.

the intention of the parties there, as shewn by the attornment clause, was, that the mortgagee should have a remedy available in case of bankruptcy. In my opinion a similar conclusion ought to be drawn from the deed in this case, and I think the only intent and meaning of it was, that if bankruptcy or insolvency should happen the mortgagees should have a remedy which would give them a preference over the other creditors. So much for the deed.

There is, moreover, to be considered this, that at the time when the title of the liquidator arose, the 10th section of the Act which I have read was of course operative, and the law then was, that as between secured and unsecured creditors the law of bankruptcy should prevail. The bankers were secured creditors; the rest of the creditors are unsecured. The estate is to be administered among them according to their respective rights. A broker comes and says, "I have come here to distrain," and a managing director says, "Well, I am very sorry to see you, but I cannot help it." "Find me two trustworthy men," says the broker, and two men are brought out, and he gives these men directions to remain in possession of the property, and they obey his directions, and night and day keep watch over it. That is all they do. What he says in his affidavit comes virtually to this: "I told them, if anybody asked them what they were there for, to say they were there on my authority, and to refer him to me," and so the possession, as it is called, is taken. If this were a bankruptcy, is that a possession that the person taking it can maintain any right to? From that day down to some other later day, no matter when, the business of the company was carried on as usual, the workmen were employed as usual, no visible change took place in the possession by the company of the chattels which it is said had been distrained upon, and in the actual visible possession of the company they had remained with the full consent of the bankers. If the law in bankruptcy is to be applied, this is clearly and plainly a possession by the true owners, if the bankers are the true owners, with the full consent of the company. Until the winding-up order is made, or until a petition is presented, that would be enough to dispose of the case, in my opinion. The bankers could not sell for five days; they did not attempt to sell. The broker who had formally taken possession, as he says, exercised no right

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of ownership, excluded nobody, stopped no business, assumed no character of owner, but in a conversation between himself and the managing director said, "I give you notice that I am here in possession, and these men shall keep possession for me."

The case of *In re Printing, &c., Company* (1) is a valuable case, because it contains an exposition of the law by the Master of the Rolls which, in my opinion, ought to be followed. The Master of the Rolls, after referring to the Act of Parliament, says (2): "The respective rights of the secured and unsecured creditors of a company in liquidation are the same as under the law of bankruptcy." If that is so, the case of reputed ownership is plainly made out, and there is no dispute about it. "The first question," the Master of the Rolls says, "I have to consider is, are the creditors in question secured or unsecured? They are certainly secured in a sense, by having taken the property of the company, the debtor, in execution."—A distress, in my opinion, is not more potent than an execution.—"Under that execution they were entitled to sell the property and pay themselves out of the proceeds; they are secured in that way; they are not secured under contract. Persons holding security, whether under an execution or a garnishee order, or by judgment on tort, or by contract before judicial interposition, are secured creditors." But I have not heard it denied that the bankers in this case were secured creditors. "Then," the Master of the Rolls continues, "if the applicants in this case are secured creditors, what are their rights? Their rights are to be determined by the law of bankruptcy;" and the 87th section of the Act provides for the case where there has been a seizure and a bankruptcy within fourteen days, and where the proceeds are held by the sheriff for the trustee in bankruptcy. The Master of the Rolls says: "That section, therefore, defines the rights of an execution creditor in bankruptcy. Now the 10th section of the *Judicature Act*, 1875, says that in the winding-up of a company the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." I can hardly conceive any words in which

(1) 8 Ch. D. 535. (2) 8 Ch. D. 538.

the meaning could be more distinctly expressed, or an enactment more plain and positive. "One of such rules," the Master of the Rolls says, "is, as I have shewn, that an execution creditor is not to have the benefit of his execution if within fourteen days after the sale of the debtor's property the sheriff has notice of bankruptcy. I must therefore apply that rule to the present case, and hold that even if the sheriff had actually sold the property of the company, the execution creditors could have had no right to pay themselves out of the proceeds, but the whole of the proceeds must have been handed over to the liquidator for the general benefit of the creditors."

In my opinion the law so expressed by the Master of the Rolls is the law which governs this and all like cases of a secured creditor, whose security is not perfected and completed by sale or by some other act, and for that reason the Court takes possession of the whole of the estate of the insolvent company, and no step can be taken by the secured creditor to complete his security but with the sanction of the Court.

Now let me suppose there was an application before me on behalf of the secured creditor that he might complete his security by the receipt of the proceeds of the sale of this property—the Court being reminded that there was no law to administer but the law of bankruptcy. The law of reputed ownership is a part of the law in bankruptcy; the reputed ownership clearly was in this company up to the time when its insolvency commenced, and the rights being the same as they would be in bankruptcy, the bankers who exercised their power to distrain and who made this very imperfect distress can have no right to complete their distress at the expense of the unsecured creditors.

I am of opinion, therefore, that the liquidator's summons ought to be acceded to, and that as to the sum of £4533 17*s.* which is *in medio*, he is entitled to receive that sum, and he is entitled to receive and possess and realize under the liquidation all the other chattels which were seized under this distress.

There will be an order accordingly; the costs of all parties to come out of the estate.

C. A.

On the 9th of January Messrs. *Backhouse & Co.* gave notice

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that the Court of Appeal would be moved on the 15th inst., or so soon after as counsel could be heard, that the order of the 5th of December might be discharged, and the application of the liquidator dismissed with costs. The appeal came on among the appeals from interlocutory orders on the 22nd of January, 1879.

Argument.

Sir *H. Jackson*, Q.C., *Horton Smith*, Q.C., and *B. B. Rogers*, for the Appellants.

*Hemming*, Q.C., took a preliminary objection:—

By Order LVIII., rule 4, notice of appeal from any judgment, whether final or interlocutory, is to be a fourteen days' notice, and notice of appeal from an interlocutory order is to be a four days' notice. By rule 9 the time for appealing from an order in a winding-up is to be the same as for an appeal from an interlocutory order. This rule treats such orders as not being interlocutory, and though the time for appealing is the same as if they were so, they must for all other purposes be treated as final orders when they are such in their nature: *In re National Funds Assurance Company* (1). The notice, therefore, ought to have been a fourteen days' notice, and is invalid.

[JESSEL, M.R.:—The Court of Appeal, under Order LVIII., rule 3, has power to amend it.]

Where a Respondent has gained an advantage by the Appellant's non-compliance with the rules, the Court of Appeal does not relieve the Appellant except on special grounds, and it is necessary that the Respondent should have acted so as to raise an equity against him: *Rhodes* v. *Jenkins* (2).

[JESSEL, M.R.:—That turned upon Order LVIII., rule 15, where "special leave" is required, which has been held to mean "leave granted on the ground of special circumstances." The same principle does not apply to an application for leave to amend under rule 3, which says nothing about special leave.]

The rules say nothing about special circumstances; and "special leave" appears properly to mean leave granted on any particular

(1) 4 Ch. D. 305. (2) 7 Ch. D. 711.

occasion, having regard to the circumstances of the particular case as distinguished from leave granted by general orders in all cases of a particular class.

Sir *H. Jackson*, Q.C., *contrà*, was not called upon.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

The argument we have heard amounts to this, that where a simple slip has been made in the form of a notice of appeal we are not to allow it to be amended. If this be so, the only case in which the power given by Order LVIII., rule 3, can be exercised, is where a mistake has been made on purpose, which is absurd. Assuming the notice already given to be insufficient, leave to amend must be given, but of course the Respondent is entitled to insist that the appeal shall not be heard till the expiration of the proper notice.

Baggallay and Bramwell, L.JJ.

BAGGALLAY and BRAMWELL, L.JJ., concurred.

Sir *H. Jackson*:—It would be convenient if the Court of Appeal would decide whether a fourteen days' notice was requisite. The practice has been to treat such appeals as requiring only a four days' notice, but the rules do not appear to be clear. Order LVIII., rule 4, which defines the notice, deals with "judgments" and "interlocutory orders." This does not seem to be an interlocutory order (1); it is questionable whether it is a judgment.

[JESSEL, M.R.:—Order XLII., rule 20, tends to shew that it is not.]

Order XLI., rule 1, points to the conclusion that judgment means only judgment in an action.

JESSEL, M.R.:—

There is some difficulty in the rules which makes a slip very excusable. The rules appear to contemplate two classes of orders: final orders which determine the rights of parties, and orders which

(1) See 1 Ch. D. 41.

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do not determine the rights. We are of opinion that the order now under appeal belongs to the former class, and that a fourteen days' notice was necessary.

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Argument.

Jan. 29. Sir *H. Jackson*, Q.C., *Horton Smith*, Q.C., and *B. B. Rogers*, for the Appellants:—

The Vice-Chancellor decided this case mainly on the authority of *Ex parte Williams* (1), which we submit is wholly inapplicable. That case followed *Ex parte Mackay* (2), and went on the ground that the security was an attempt to oust the law of bankruptcy by a contract between the parties. The Vice-Chancellor seems to have argued from the event to the contract, and to have held that because the security was sought to be enforced after what the Court held tantamount to a bankruptcy, it was a security intended to take effect only in the case of bankruptcy, and the rent named was so excessive that it shewed the transaction to be a sham. But the rent, to say the least, is not outrageous. Then the Vice-Chancellor treated this as a bill of sale, and considered us to be taking an insufficient possession under an unregistered bill of sale. But this was not a bill of sale. It is true that now under the *Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31), s. 6, an attornment may be treated as a bill of sale, but that very enactment shews that it was not so before. Then as to the effect of the *Supreme Court of Judicature Act*, 1875 (38 & 39 Vict. c. 77), s. 10, if that section puts us on the same footing as if there was a bankruptcy, a proposition which we do not care to contest, we are protected by the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), s. 34, as the value of the chattels is less than one year's rent. Though the mortgagees here are not, in the popular sense, landlords, they are so within the meaning of the Act: *Ex parte Hill* (3). A landlord distraining need not sell at once, he may sit upon his security: *Lehain* v. *Philpott* (4). The doctrine of reputed ownership is out of the case, for a distress does not alter the property in the goods till a sale takes place.

(1) 7 Ch. D. 138.
(2) Law Rep. 8 Ch. 643.
(3) 6 Ch. D. 63.
(4) Law Rep. 10 Ex. 242.

*Hemming*, Q.C., and *Romer*, *contrà* :—

It is conceded that in this case the rules in bankruptcy apply. How would this attornment clause have stood in bankruptcy? Such a clause is not uncommon where a mortgagor is in occupation, but the practice is to confine the rent to the amount of interest.

[JESSEL, M.R. :—If there is an ascertained principal, that is so, but if the interest was reducible on punctual payment, the rent would be equal to the larger amount of interest. In a banker's mortgage there is no ascertained interest, and the rent cannot be thus fixed, and in this case the interest is left in blank in the deed.]

The interest could not be on a larger sum than £50,000, so the rent reserved is out of all proportion to the interest.

[JAMES, L.J. :—Suppose a man lends £1000 on mortgage of a house worth £500 a year, which is in the mortgagor's occupation, and the mortgagor attorns at £500 a year, why should not this be valid, and why should not the rent go in reduction of the principal?]

The evidence shews that £5000 is extravagantly beyond the value, which brings the case within the principle of *Ex parte Williams* (1). Moreover, we contend that an attornment clause does not create the relation of landlord and tenant as regards third parties. If I attorn tenant to a person who has no legal estate, and here the mortgagees had none, I am estopped, but there is no legal tenancy as regards third parties.

[JESSEL, M.R. :—This is not properly an attornment, it is the creation of a tenancy.]

But the persons professing to let had no legal estate.

[JAMES, L.J. :—Do you mean to contend that a person who lets land has not all the rights of a landlord although the legal estate is outstanding?]

I do not dispute that he has as against the tenant by estoppel where the intention is to create the relation of landlord and tenant; but here there is no such intention, the only object being

(1) 7 Ch. D. 138.

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to give a security. Can a person in such circumstances create a power of distress so as to enable the so-called landlord to seize the goods of third persons merely by calling a sum rent when it is not rent, *i.e.*, a sum paid periodically for the use of land? Suppose a warehouseman grants a mortgage, can he by an attornment clause enable the mortgagee to seize goods of third parties on the premises to any amount by naming a large sum as rent?

[JESSEL, M.R.:—There may be a rent so large that the reservation of it must be pronounced a sham.]

We say that this rent is so.

[JAMES, L.J.:—You must shew that it was rent which both parties knew to be outrageous.]

We submit that the right of distress does not arise unless there is a *bonâ fide* relation of landlord and tenant created, *i.e.*, possession given to the tenant by the landlord, and rent reserved as an equivalent for it.

[JAMES, L.J.:—Do you carry it so far as this, that every attornment clause is void as against the trustee in bankruptcy?]

Yes; we contend that sect. 34 does not apply to the *quasi* tenancy created by an attornment clause. No authority for so applying it can be found. The effect of such a clause is to give security. The purpose is to get security; and where both effect and purpose point to security, it is a mere sham to give it the form of a remedy for rent, which it is not except in form, for it is not meant as payment for the use of land. It is practically a security to take effect in case of a bankruptcy. The Court cannot shut its eyes to the fact that this was a device to get a security on the chattels.

Then we say that this is a bill of sale. The *Bills of Sale Act*, 1854 (17 & 18 Vict. c. 36), expressly includes authorities to take possession of chattels, and this is such an authority.

[BRAMWELL, L.J.:—At that rate every lease is a bill of sale of chattels.]

In the case of a lease there is only the effect of enabling the lessor to seize them; here there is the purpose as well as the effect.]

[JAMES, L.J.:—Would not a subsequent incumbrancer be entitled to treat a first mortgagee under a clause of this nature as a mortgagee in possession as to the rent thereby reserved, and charge him with it as rent which but for his wilful neglect or default he might have received?

JESSEL, M.R.:—Probably the fear of this is the reason why the rent generally is made only equal to the interest.]

I should have thought he would not be mortgagee in possession.

Then we say that the seizure was not *bonâ fide;* it was a mere arrangement between the mortgagors and mortgagees.

[In answer to a question from the Court Sir *H. Jackson* said that the mortgagees waived all claim to the unsold chattels, adding that they considered them to be practically worthless.]



JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Bacon*, and the question to be decided is whether the Appellants are or are not entitled to a sum of about £4553, the proceeds of the sale of certain chattels which belonged to the company called the *Stockton Iron Furnace Company, Limited*, now in liquidation, and which have been sold by arrangement since the commencement of the liquidation, without prejudice to the rights of the parties.

The title of the Appellants was founded on a deed dated in 1875, by which they, being bankers, took what I may describe as an ordinary banker's mortgage from the company, the mortgage comprising the property of the company, which was copyhold, on which they carried on their works. This mortgage was given to secure the ordinary banker's balance to an amount not exceeding £50,000, and it contains this clause:—[His Lordship read the attornment clause.] Under that clause the Appellants say that the company became their tenants from year to year at a rent of £5000, and they put in a distress nominally for two years' rent, but inasmuch as the value of the property in question does not amount to one year's rent the Appellants have agreed to limit their claim to the sum of cash in dispute, £4553 17*s.* 1*d.*

The first question to be considered is whether there was any

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tenancy at all, or, as it has been put in the argument for the Respondents, any *bonâ fide* tenancy. Now it appears to me that there was. In the first place, we must remember that according to the course of practice of conveyancers, when the mortgagor is occupying, so that there is no rent receivable to meet the interest on the mortgage debt, it is usual that he should agree to become tenant. There is nothing novel or remarkable in the mortgage. It is in the ordinary form. But then it was said that the rent was so excessive, and so very much above the annual value of the property, that it never could have been intended that an actual tenancy should be created. In the first place, I am not satisfied that the rent was excessive. The evidence stands in this way: five valuers say that the property was quite worth £5000 a year; four valuers say that it was not worth more than half that sum; but when we consider the nature of the property, and, I may add, the nature of the valuers, it becomes impossible to say that there was any excess, or any large excess. You cannot let these properties to everybody. They are not ordinary properties as to which valuers can really give an opinion which would be accepted by other persons; what is the proper rent must be to a great extent a mere matter of individual opinion, and upon this evidence I am by no means satisfied that the rent was in fact excessive, and certainly it is not shewn to me to be so excessive as to prove that there was any intention on the part of the two parties to this mortgage that it should not be a real rent but a fictitious rent. Then it was said that the object of the mortgagors becoming tenants was repugnant to the bankruptcy law, for that the object was to enable the mortgagees, in case of bankruptcy, to distrain for the rent in arrear, and in that way obtain a preference. As regards one year's rent, which is all we are now considering, the 34th section of the *Bankruptcy Act*, 1869, gives the landlord that preference, and therefore there is nothing in the law of bankruptcy to prevent his obtaining the benefit of it if he is a real landlord, and he is not the less a real landlord because he is mortgagee. It was part of the bargain that he should become landlord, and no doubt the rent he receives is a security in the event of a bankruptcy, but so is the rent of the mortgaged property

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in that event whether the rent is to be paid by the mortgagor or by third persons. It does not appear to me that there is anything in this case to enable us to apply the doctrine laid down by the Court of Appeal in *Ex parte Williams* (1), to which, so far as I can properly express, I do express my assent. There is only one other objection remaining to be considered, and that is whether or not there was a distress. It is said that because the man who put in the distress went to two of the workmen and told them to keep possession for him, therefore it is not to be looked upon as a real distress. But I think that is a mistake. No doubt the bankers only meant to make themselves safe. They did not wish to prevent the company from going on if it could go on, so long as they were safe, and they did not wish that the public should know too much about the distress as long as there was a chance of the company going on. The fact is that a petition to wind up was presented within three days after they made the distress. What they did, therefore, was really only for the purpose of exercising their right of distress, which is a right incident to their position of landlords, and their object and meaning, and the object and meaning of the company by their manager, who acceded to the arrangement by which the workmen kept possession on behalf of the broker, was that there should be a distress to make the bankers safe whatever should happen to the company. It appears to me that the distress was perfectly *bonâ fide*, that the sole object of the parties was a *bonâ fide* distress, and that therefore there is no objection upon that ground. There were other arguments brought forward on behalf of the Respondents, but they were not the grounds of the judgment in the Court below, and I do not see that they have any application to the case before the Court. I may mention particularly the arguments on the *Bills of Sale Act*. This is not a bill of sale as I understand the former *Bills of Sale Act*, which was the only one then in force; it is not a license or authority to take possession of chattels within that Act, and it is therefore not necessary to consider whether the *Judicature Act*, 1875, s. 10, would extend so as to bring into operation the *Bills of Sale Act* and make it applicable to the cases of winding-up.

On the whole, it appears to me that the Appellants are right in

(1) 7 Ch. D. 138.

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their contention, and that an order in their favour ought to be made with costs.

JAMES, L.J.:—

I am of the same opinion. As to the case of *Ex parte Williams* (1) which has been called to our attention, I entirely reaffirm, if it were necessary to reaffirm, everything that was there said. If the rent had, as in that case, been of such an absurd amount that it could never have been intended to have been a rent, but must have been intended as part of a device to enable the mortgagee to get something in bankruptcy which he would not otherwise get, the principle of that case would have been applicable. But I am by no means satisfied that there was anything unreasonable in the rent which was reserved. No doubt, as was pointed out to us by the counsel for the Respondents, we cannot shut our eyes to this, that the bankers probably did mean by this clause to get a security upon the chattels which otherwise they would not have had, but they got that security on the chattels by means which are not prohibited by law—they got it by means of an arrangement that they should be landlords, and that arrangement, in the then state of the law, carried with it the incidents of distress. They were doing it by an arrangement which gave them the rights, and only the rights, of landlords, and made them subject to all the liabilities of mortgagees in possession. An actual lease being created with a reservation of rent, the bankers were as much mortgagees in possession, for all purposes of taking the account of what was due on the mortgage, as if they had granted the lease to some new lessee and had given notice to that lessee to pay the rent to them. They were mortgagees in possession liable to account in respect of this £5000 a year as against any second mortgagee or incumbrancer for what they had received or, but for their wilful default, might have received. Their rights as landlords are very different from the rights they would have had under a bill of sale, for a bill of sale would have given them the right to seize the chattels for the whole amount of their debt, both principal and interest. Under the bankruptcy law, or under the winding-up law, which may be taken together, all they get is

(1) 7 Ch. D. 138.

one year's rent. They were incurring liabilities as mortgagees in possession, and they have a limited right as landlords. It appears to me that such a tenancy has all the incidents of a tenancy both as regards the parties themselves and a third person whose goods happen to be on the property. That being so, there is nothing which was in violation of any rule of law, or anything that could be said to be in fraud of the bankruptcy law. I quite agree with the Master of the Rolls that the order of the Court below ought to be reversed with costs, and the costs of the appeal will also be given to the Appellants.

BRAMWELL, L.J.:—



I am of the same opinion. I have no doubt that this deed in every part of it was, as it is expressly declared to be, "a security for the balance for the time being on the account current of the said company." I have no doubt that this deed in every clause of it was so intended, and I have no doubt that whatever money was received under the distress that has been made must go in part payment of the debt which would otherwise be payable from the mortgagors to the mortgagees. I have no doubt also that the object of this clause of tenancy must have been to enable the mortgagees to avail themselves of the chattels of the company under a distress for rent. The observation to be made upon it is this—they had a right so to arrange. They might have had the goods or the property conveyed to them with the power of seizing future goods, but that would have been a bill of sale requiring registration. Instead of taking such a security, they took a clause of tenancy, the effect of which was to enable them to distrain for the rent. The law does not forbid their entering into such an arrangement, taking all the beneficial and all the inconvenient consequences arising from it. One of the consequences would be this —to give a second mortgagee a right to charge them with the rent they might have received. Another consequence of it is this, to which attention has not yet been called: it is true that they have a power to enter and resume possession, or take possession, and so to determine the tenancy from year to year, but not until after the 23rd of August, so that for six months under this agreement for tenancy, whether the premises were surrendered as

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covenanted or not, the mortgagors would have a right to the possession of this land as against the mortgagees, and they could have possession under no other title than as tenants, because but for this clause the rights of possession would have been in the mortgagees. There are various differences between the two kinds of security. If they had taken the security in the shape of a present grant of chattels on the premises, with a right to seize subsequent chattels, there would have been no right on the part of the mortgagors to dispose of any of the chattels which they had so granted, since they would have belonged to the mortgagees; but under the actual arrangement, until a distress was made, all the chattels on the premises might have been sold by the mortgagors, or taken in execution by the sheriff, and upon being removed from the premises would have been free from any claim for rent. The law allows them to take the security in the form in which they did take it, with all its consequences.

Then, with reference to the case of *Ex parte Williams* (1), I think it is very likely, indeed I have no doubt, that the parties here did not contemplate that the £5000 a year would be paid if things went on prosperously and fortunately. In all probability nothing would have been paid except the interest. But they did not intend that it should never be paid. There was no agreement between the parties inconsistent with the arrangement expressed in this deed, although there was an understanding upon the part of both parties that it would not be put into operation while the affairs of the company went on prosperously. To my mind, the difference between this case and *Ex parte Williams* is this, that in *Ex parte Williams* it was found, and, if I may add my concurrence to that case, it was rightly found, that the intention and object of the arrangement there was to commit what was called a fraud upon the bankruptcy law, by entering into stipulations which were not to be enforced except in the event of bankruptcy. Here, although no doubt the parties did not contemplate the mortgagees putting their right to the rent into operation, yet if there had been no liquidation the bankers would have made the distress which they have made, if for any other reason they had thought that their balance was ill-secured.

(1) 7 Ch. D. 138.

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An order was made discharging the order under appeal, so far as it ordered the payment of the money to the liquidator, and ordering the £4533 to be paid to the bankers, that part of the order which related to the unsold goods remaining unaltered.

Solicitors: *Kearsey, Son, & Hawes; R. T. Jarvis; Cree & Son.*

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## HUGGONS *v.* TWEED.

C. A. 1879 *Jan.* 15.

[1878 H. 182.]

*Counter-claim—Rules of Court*, 1875, *Order* XIX., *r.* 3; *Order* XXII., *r.* 9.

The executors of *M.*, a holder of debentures of a company to the amount of £2000, commenced an action to have the trusts of a deed for securing payment of the debentures of the company carried into execution. The company delivered a defence and counter-claim. By the defence they alleged that an amount exceeding £2000 was, under the circumstances mentioned in the counter-claim, due from *M.* to the company, and claimed a set-off. By the counter-claim they alleged that *M.* had been a director and promoter of the company, and while filling those characters had joined with other persons in selling an estate to the company at a profit, concealing the fact of his interest in the estate, and that he had received more than £2000 as his share of the profit of the transaction. The counter-claim asked that the executors might be ordered to pay to the company the share of profit which *M.* had received, and also the remainder of the profit which, in breach of his duty as a director, he had allowed to be received by the other vendors. The Plaintiffs applied to have the counter-claim excluded on the ground that it could not be conveniently disposed of in the present action, and ought to be tried in an independent proceeding. The application having been refused by *Hall*, V.C., the Plaintiffs appealed:—

*Held*, that although, taking Order XIX., rule 3, and Order XXII., rule 9, together, the question whether a counter-claim shall be excluded is not so entirely in the discretion of the Judge of first instance as to preclude an appeal, he has a discretion which will not be interfered with by the Court of Appeal except in a very strong case, and that in the present case this discretion had been rightly exercised.

Statement.

THIS was an action by the executors of *T. C. Munday* on behalf of themselves and all other the holders of overdue debentures of the *San Pedro (Chili) Copper Mining Company, Limited*, against the company and the trustees of a deed for securing payment of the

(1) See 44 Ch. D. 350, 352.

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debentures of the company to have the trusts of that deed carried into execution.

*T. C. Munday* was the holder of debentures of the company to the amount of £2000, and died in May, 1875. On the 18th of April, 1878, the company passed an extraordinary resolution to the effect that it had been proved to their satisfaction that they could not by reason of their liabilities continue their business, and that it was advisable to wind up the same.

On the 7th of May, 1878, this action was commenced. On the 10th of May, 1878, it was ordered that the winding-up should be continued under supervision, and on the 23rd of May an order was made in this, and in another action by subsequent incumbrancers, for the appointment of a receiver and manager.

The company delivered a statement of defence and counter-claim. By the last paragraph of the defence they alleged that the amount due from the executors of *Munday* to the company, under the circumstances stated in the counter-claim, exceeded the amount due from the company on the debentures held by the executors, and the company claimed to set off the sum so due to them against the amount due on the debentures. The company then alleged, by way of counter-claim, that at the time of the agreement of the 12th of February, 1872, thereinafter mentioned *Munday* and other persons who had formed a syndicate for the purpose of purchasing the mine and property referred to in the memorandum of association, and forming a company to take them over, had agreed with the then owners for the purchase of them for £16,000. That the agreement for purchase was entered into in the name of *F. R. Wilson*, as the nominal purchaser. That on the 31st of January, 1872, *Munday* and others of the promoters held a meeting at which it was resolved that the company should be formed with the object of purchasing and working the above mines and property, and that the purchase-money should be £40,000, and that the first directors should be *Munday* and two other persons, who were promoters and members of the syndicate. That on the 12th of February, 1872, an agreement was entered into between *F. R. Wilson* and *William Allen*, that *Wilson* should sell to the company to be formed as therein mentioned the mines and property for £40,000. That *Allen* was a mere

nominee of the promoters, and the agreement had been settled under their direction. That on the 2nd of March, 1872, a meeting called a preliminary meeting of directors was held, at which only *Munday* and another were present, at which they purported to approve of the contract, and to adopt the memorandum and articles of association, and directed the solicitors to register the company. That the company was accordingly registered on the 4th of March, 1872. That the memorandum stated the object of the company to be to purchase and work the mines and property comprised in the agreement of the 12th of February, 1872, and by the articles the agreement was adopted, and *Munday* and the two other persons above referred to were appointed the first directors. The counter-claim went on to shew that the purchase had been completed, and the £40,000 paid to *Wilson* by the direction of the directors out of the moneys received from shareholders; and that the profit of £24,000 was divided among the members of the syndicate with the knowledge of the directors, *Munday* receiving £2625 as his share. That no communication was made by the directors, or any of them, to the persons who were invited to take shares or apply for debentures in the company, to the effect that any of the directors were interested in the property purchased by the company, or were to receive any part of the purchase-money, and that the shareholders other than the directors were wholly ignorant of those facts until the winding-up. The company claimed that the executors might be ordered to pay to the company the £2625 received by *Munday*, with interest from the time when he received it, and might also be ordered to pay to the company the £21,375 which *Munday*, in breach of his duties as a director, directed or allowed to be paid to the other members of the syndicate, with interest from the time when it was so paid; and that if the executors did not admit assets *Munday's* estate might be administered.

The Plaintiffs applied by summons that the counter-claim might be excluded from the action, on the ground that it could not be conveniently disposed of in the action, and ought not to be allowed; and that the claim thereby raised ought not to be disposed of by way of counter-claim, but in a separate and independent action. Vice-Chancellor *Hall*, in Chambers, refused the application, and

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Argument.

an appeal was brought direct from Chambers. The appeal was heard on the 15th of January, 1879.

*Dickinson*, Q.C., and *Beale*, for the appeal:—

We submit that this is not a proper case to be raised by way of counter-claim. Neither the defence nor the counter-claim has any bearing on the question whether the trusts of this deed must be carried into execution.

[JESSEL, M.R.:—The Defendants raise a case not of mere tort but of equitable debt. They might have stopped your action by paying your debt; instead of that they say, We bring in as payment a debt which you owe the company.]

Though there may be an equitable debt, still the claim is in the nature of tort, and it will cause great expense and delay in the prosecution of what would otherwise have been a very simple action. The question will have to be tried in the presence of twenty persons. We also lose the benefit of having security for costs, which we should have in an independent action. There is an action pending by another debenture holder, and our action will be unduly impeded as compared with that by having this claim tried in it. The convenient course would be for the company to proceed by independent action, and attach whatever is coming to the Plaintiff in the present action if they establish their claim.

[JESSEL, M.R.:—Under the terms of Order XIX., rule 3, is this order subject to appeal? Does not that rule leave it in the discretion of the Judge of first instance to follow the course which appears to him most convenient?]

That rule must be read in connection with Order XXII., rule 9, which provides that on an application to exclude a counter-claim such order shall be made "as shall be just," which shews that the matter is not one purely resting on the discretion of the Court of first instance. We are before reply, and we proceed under the latter rule.

*Hastings*, Q.C., and *Grosvenor Woods*, *contrà*, were not called upon.

JESSEL, M.R.:—

The first point we have to consider is on the construction of the general rules, in the framing of which I am afraid that a little slip has occurred. There are two rules bearing on the case. Order XIX., rule 3, and Order XXII., rule 9, the former of which empowers the Court or Judge to exclude the set-off or counter-claim on an application before trial, the latter on an application before reply. The former rule is found in the schedule to the Act of 1873. The latter rule was one of the rules framed under that Act, with which rules the schedule was not originally incorporated, and probably it is owing to this that the difference between the two rules escaped notice. Taking them together, I think it tolerably clear that we ought to hold the case to be one in which an appeal will lie. But we must not forget that Order XIX., rule 3, treats the matter as one of convenience. Now the question how a claim can be most conveniently disposed of is for the discretion of the Judge—a judicial discretion indeed, but still a discretion the exercise of which is not lightly to be interfered with. The Court of Appeal, in a strong case, would interfere with the exercise of this discretion, but I think that it ought to do so only in a strong case where injustice is likely to be done if it does not interfere. I say nothing about the merits of the pleadings in the present case, for it is possible, though not, I think, very likely, that there may be a demurrer, and I do not wish to say anything to prejudice the argument of the question which would then have to be disposed of. The Plaintiffs are the executors of the holder of debentures of the Defendant company, and ask to have the trusts of a deed for securing the debentures carried into execution, that is, in substance, they seek to obtain payment out of the property which has been made a security for the debentures. The defence set up by the company is, "Your testator was a promoter and director of the company, and in that capacity he sold property to the company at a profit, concealing the fact that he was one of the owners, and he received as his share of the profit a sum of £2600, which ought to be set off against his claim upon the company." The case thus set up is one of an act wrongful indeed, but which does not give a mere claim for

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damages arising from a tort, but creates an equitable debt, and I cannot see any reason why the Court should say that it is not to be allowed to be set off in the pending action. If the case made by the Defendants is true, the Plaintiffs have no right to interfere with the property of the company. The case raised by the counter-claim is the same as that raised by the defence, and I think it right that the company should be allowed to bring it forward by way of counter-claim. The company may say "We will waive the set-off, we should prefer obtaining a judgment and leaving you to take a dividend." I think that the Vice-Chancellor has exercised a sound discretion, but had I felt more doubt on the subject than I do, I should not have thought it a case for interfering with his decision.

It is urged that if the counter-claim is allowed to stand the Plaintiff is deprived of his right to get security for costs; but that argument applies in every case of counter-claim, and the Legislature has not thought fit to provide for it.

Then it is said that this action ought not to be delayed, inasmuch as another debenture holder has brought an action. But the company is not to lose any of its rights against the Plaintiffs because another debenture holder has taken proceedings. I am not sure that any ill result is likely to follow, and the Court has power to continue the receiver in both actions.

Baggallay, L.J. BAGGALLAY, L.J.:—

The counsel for the Appellants rest their case on Order XXII., rule 9. The distinction between that rule and rule 3 of Order XIX. is, that under the last named the application may be made at any time before trial, and under the other, must be made before reply. Rule 9 seems as if it had been originally intended to apply only to the case of persons other than the Plaintiff. And such a person might have a right to say "Why is the case against me to be mixed up with an action with which I have nothing to do?" Here the contest is between the same parties, and the question to be considered is only what is the most convenient mode of having the case disposed of. On a question of that kind we should not readily interfere with the discretion of the Judge of first instance.

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BRAMWELL, L.J.:—

Judgment, C. A. Bramwell, L.J.

The argument of the Appellants is not founded on principle, but on the ground that it is more convenient that the question raised by the counter-claim should be decided in a separate action. On such a question the Court of Appeal will not disturb the decision of the Court of first instance except for very strong reasons, and in the present case I am in favour of the conclusion at which the Vice-Chancellor has arrived.

Solicitors: *J. Rand Bailey; Stibbard, Gibson, & Co.*

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## *In re* FORD AND HILL.

C. A.
1879
Jan. 24–27.

[1878 F. 10.]

*Vendor and Purchaser—Inquiry as to Incumbrances.*

A purchaser made the following requisition, "Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?":—

*Held*, by *Hall*, V.C., on an application under the *Vendor and Purchaser Act*, 1874, that the vendor's solicitors must make a complete answer to the requisition and order made on them accordingly.

*Held*, on appeal, that neither the vendors nor their solicitors were bound to answer any part of the requisition.

Statement.

THIS was an appeal from an order of Vice-Chancellor *Hall*, under the *Vendor and Purchaser Act*, 1874.

*Ford* and *Harford*, who were trustees for sale, having contracted with *Hill* for the sale to him of certain freehold property, the purchaser sent in requisitions, among which was the following:—

"8. Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?"

The reply was, "We invariably decline to answer questions of this description." The requisition being pressed, the reply was returned, "The vendors will reply if required, but they have no knowledge of the contents of the abstract."

A summons was taken out under the *Vendor and Purchaser Act*

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by the purchaser for an order on the vendors and their solicitors to answer this inquiry. The case was heard by Vice-Chancellor *Hall* in Chambers. His Lordship adhered to his decision in *In re Solomon and Davey* (1), and made an order "that *R. L. G. Vassall*,

(1) March, 1875.

*In re* SOLOMON AND DAVEY.

HALL, V.C.:—

This is a summons under the 9th section of the 37 & 38 Vict. c. 78, intituled "An Act to amend the law of vendor and purchaser, and further to simplify title to land." The property the subject of the contract is a freehold dwelling-house and shop in *Thomas Street*, in the city of *Bristol*. The purchaser sent to the vendor's solicitor requisitions on title, the third requisition being this, "Whether the vendor is or his solicitors are aware of any judgments, settlements, mortgages, charges, or incumbrances of any description affecting the property not disclosed by the abstract of the vendor's title." The vendor's solicitor declines to answer the requisition. I am of opinion that the requisition must be answered. It has been the practice of conveyancers ever since I commenced practice to make a requisition somewhat similar to the one in question. Sometimes it has been less specific, *i.e.*, not mentioning settlements or mortgages. The requisition has generally been answered. But for a long time past some solicitors have objected to answer it, their reason being that answering it might subject them personally to legal liability to the purchaser, although they were not morally guilty. Upon such objection being made the requisition has sometimes not been insisted on, but this has generally been done to avoid delay and possible litigation. Some counsel have always insisted on the requisition being answered, and I believe their doing so has almost always obtained an answer. The ground of objection to answering this requisition is, I consider, insufficient. Some solicitors answer the requisition in this manner. "Not that we are aware, but the purchaser's solicitor should make the usual searches." Such form of answer, I consider, gets rid of the objection. The requisition is one which causes the vendor's solicitor to consider whether the property sold is not affected by something which it had not occurred to him did affect it, such as a charge under some drainage or local Act, and it is the fact that purchasers have been thus frequently protected against defects of title which had been overlooked by the vendor's solicitor. The requisition in the present case goes to the solicitor's knowledge and also to that of his client. This involves inquiry by the solicitor from his client. I think it not unreasonable so to frame the requisition. To answer it the solicitor must communicate with his client. There may be cases in which, by reason of the client's absence or under other circumstances, a purchaser may be compellable to complete his purchase without the answer to his requisition extending to the client's knowledge, but I think these are exceptional cases. In what I have said I must not be considered as altogether approving of the requisition being made in the form above mentioned. The answer to it might lead to the disclosure of what the purchaser would rather not know. The requisition should, I think, ordinarily be added to thus, "and which, if remaining undisclosed, may prejudicially affect the purchaser." Vice-Chancellor *Wood*, in *Drummond* v. *Tracy* (Johns. 608),

Statement.

*T. Parr*, and *J. Osborne*, of the city of *Bristol*, practising under the style of *Osborne, Ward, Vassall, & Co.*, the solicitors of the said *J. Ford* and *W. H. Harford*, do make a full, sufficient, and complete answer to the eighth requisition as to the title of the said *James Ford* and *W. H. Harford* made upon and arising out of the abstract of such title delivered by the said *J. Ford* and *W. H. Harford* to the said *C. Hill*, and that a list of the incumbrances appearing in such abstract be made and shewn to the said *J. Ford* and *W. H. Harford*, and that the said *J. Ford* and *W. H. Harford* do answer the said requisition as to their knowledge of any settlement, deed, fact, omission, or any incumbrance affecting the property sold not appearing in such list," and that *Ford* and *Harford* should pay *Hill* his costs of the application.

The vendors appealed from this order. The appeal came on to be heard on the 24th of January, 1879.

Argument.

*Everitt*, for the Appellants:—

There is no reported case in which a vendor or his solicitor has been held bound to answer such a requisition. The practice of making such an inquiry appears from *Dart's* Vendors and Purchasers (1), and Mr. *Christie's* evidence there referred to, to be a recent one, and it is an unreasonable practice. The Court has no jurisdiction to order the solicitor to answer it, and if he were to submit to answer it and omitted anything, he would be liable to

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seemed to consider (see p. 612) that a vendor's obligations were not merely co-extensive with his obligations in respect of the contents of the abstract; and having regard to his judgment in that case, I cannot doubt that he would have held that the vendor's solicitor must answer all relevant questions in respect to existing liabilities, including such a question as the requisition in question; and I consider that that judgment materially supports my decision, although it has been (and I think correctly) thought that the Vice-Chancellor's judgment in that case went too far.

1875. April 16. The order drawn up as of this day was "that the above-named *A. Solomon*, the vendor, do within seven days from the service of this order answer the third requisition of the said *F. Davey* as to whether the vendor is or his solicitors are aware of any judgments, settlements, mortgages, charges, or other incumbrances of any description affecting the property not disclosed by the abstract of the vendor's title," and that the vendor should pay the costs of the application.

(1) 5th Ed. p. 449.

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criminal proceedings under 22 & 23 Vict. c. 35, s. 24. He may have gained a knowledge of the title as solicitor to some other person; is he bound to disclose knowledge so obtained? The inquiry, even if restricted to the vendor himself, is objectionable. The conditions bind the purchaser to accept a limited title; by this inquiry he tries to go beyond the contract, and to obtain information from which it debars him. Moreover, vendors are not usually acquainted with the title, and have to apply to their solicitors for information, so that, in whatever form it be put, this inquiry comes to an inquiry from the solicitor. In the present case the vendors are assignees of an insolvent, and know nothing of the title. If the inquiry is allowed at all, it ought to be qualified by a reference to the conditions of sale.

*Levett*, for the Respondent:—

This question ought to be answered, for a purchaser is entitled to a complete abstract. A complete abstract ought to notice every incumbrance: *Dart's* Vendors and Purchasers (1); *Sugden's* Vendors and Purchasers (2). The question therefore amounts to a question whether the abstract is complete, and the purchaser is entitled to an answer. He has a right to have the title "sifted to the bottom": *Knatchbull* v. *Grueber* (3). In *Jenkins* v. *Hiles* (4) Lord *Eldon* says: "The Court never acts upon the fact that a satisfactory abstract was delivered, unless the party has clearly bound himself to accept the title upon the abstract. But though the abstract is in the hands of the party who says he cannot object to it, yet he may insist upon a reference. Why? Because the decree compels the other party to produce all the deeds, papers, &c., in his custody or power, from which reasonable and solid objections to the title may be furnished." It is within this principle that at all events the requisition should be answered so far as regards the question whether there are any incumbrances not appearing on the abstract. As regards the solicitors, it is argued that their answer might make them criminally liable, but they can only be made criminally liable if they act with a fraudulent intent.

(1) 5th Ed. p. 162, 303.
(2) 7th Ed. p. 410.
(3) 3 Mer. 124, 137.
(4) 6 Ves. 646, 653.

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[JAMES, L.J.:—You need not trouble yourself about that point.

BAGGALLAY, L.J.:—Suppose a sale under conditions that the title should begin twenty years ago, must this requisition be answered as regards matters before that period?]

I do not contend that it must; the purchaser would be satisfied if the inquiry was answered so far as regards the title which the purchaser is to have.

[JAMES, L.J.:—The order under appeal is not so limited; it requires a full answer to a very wide and searching interrogatory.]

A vendor is bound to disclose a latent defect, and if I ask him whether there is one, I am only asking him to do what the Court holds it his duty to do. I rely on the principle of the two cases before Lord *Eldon*, and on the decision in *In re Solomon and Davey* (1).

[JAMES, L.J.:—The obligation to answer such interrogatories would seriously embarrass a vendor resident abroad.]

That would only be an occasional inconvenience, and the Vice-Chancellor, in *In re Solomon and Davey*, intimates that in such a case the purchaser may be obliged to complete without an answer. It is much better for both parties that incumbrances should be discovered at an early stage. The practice of conveyancers is in favour of this kind of inquiry: *Dart's* Vendors and Purchasers (2).

[JAMES, L.J.:—That requisition does not go nearly so far as yours.]

*Drummond* v. *Tracy* (3) is in favour of it, and the opinion of Vice-Chancellor *Hall* is entitled to great weight from his extensive practice as a conveyancer.

Judgment.
James, L.J.

JAMES, L.J.:—

I am of opinion that the question put by the purchaser is anything but a requisition; it is a searching interrogatory put to the vendors and their solicitors. As I understand the law, a vendor is bound to furnish an abstract of title, and, upon the requisition of the purchaser, to verify it or complete it on any point on

(1) *Ante*, p. 366, n.
(2) 5th Ed. 450.
(3) Joh. 608, 612.

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which it appears defective. That is evidence verifying the title shewn by the abstract. But if, in addition to this, questions are to be asked for the purpose of negativing the existence of incumbrances, where is the matter to end? There is no judicial authority in favour of such a requisition except that of the Judge from whom the present appeal is brought. It is obvious from the expressions in Mr. *Dart's* book, and from what Mr. *Christie* is reported to have said, that the practice of asking such a question is of modern growth, and though the settled practice of conveyancers is to be looked upon as part of the common law, I do not think that a modern practice in which some conveyancers differ from others is to be treated as part of the law of the land, so as to make it part of a contract for the sale of land that the vendor subjects himself and his solicitors and agents to give answers to such questions as this. The introduction of new-fangled requisitions of this kind is dangerous and ought to be discouraged, as tending to increase the expense and delay in the investigation of titles, which already are almost a disgrace to the law of the country. What might be the result of such a question as that mentioned in Mr. *Dart's* book, "Are you aware of any document, judgment, or charge affecting the title in the property not noticed in the abstract, and which, if remaining undisclosed, may prejudicially affect the purchaser?" The vendor might say, "I know nothing about the title; I suppose that if there had been any incumbrance my solicitors would have disclosed it." How is the inquiry to be carried further? But in the present case the inquiry goes on to ask after "any fact or omission affecting the property." Is a vendor to be expected to remember every restrictive covenant to which the property is subject. A person in *New Zealand* may have occasion to sell his property in haste; is the sale to be delayed until an answer to this inquiry has been obtained from the antipodes? What is the good of such an inquiry? Every solicitor knows that he is subject to civil and criminal responsibility if he wilfully suppresses matters prejudicially affecting the title. The purchaser is entitled to say, "I have received this abstract; I presume that you remember the provisions of the Act as to suppressing incumbrances, and that I may rely on the abstract as being complete, and I warn you that

you incur criminal liability if it is not so." (The order under appeal shews how difficult it is to apply the rule that such an inquiry must be answered, for it orders the solicitors to make a full, sufficient, and complete answer to the inquiry, an order for disobeying which they might be committed, and which could only be satisfied by every one of them making a declaration as to whether he knew of any incumbrance.) This is a new practice, for which there is no authority, and I am of opinion that the purchaser's application ought to have been refused with costs. The vendors will have the costs of the appeal.

Judgment, James, L.J.

BAGGALLAY, L.J. :— Baggallay, L.J.

I am of the same opinion, and for the same reasons. It is conceded that the order cannot be sustained to its full extent, but it is contended that an answer ought to be given so far as regards judgment debts, incumbrances, or any other thing not appearing on the abstract which would prejudicially affect the title. Except as regards incumbrances, which can be found by the usual searches, this would not go beyond what a vendor's solicitor is bound to put in his abstract. I think that the establishment of a right to have an answer to such inquiries would lead to a loose way of transacting business. A solicitor might say to himself, "I need not be particular about making my abstract complete, for there will be a requisition asking whether it is so, and that will give an opportunity of supplementing it. Such a course of practice would not only increase expense but cause additional obstacles in the way of investigating titles.

BRAMWELL, L.J. :— Bramwell, L.J.

I am of the same opinion. Contests as to the sale of real estate come more frequently before the Chancery Division than the other Divisions; but in a Common Law Division I think there would be no doubt in this case. Suppose that the vendor refuses to answer this requisition, and the purchaser thereupon refuses to complete and brings an action for his deposit. He would have to make out a breach of contract, and for that purpose must establish that the vendor had refused to answer a question which it was his duty to answer, or that a good title had not been shewn.

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He could not make out either of these points. The ground on which the vendor would have succeeded at law is an equally good ground for his succeeding here—that there is no duty to answer such a question, and that a good title has been shewn.

Solicitors: *Prior, Bigg, Church, & Adams; Gregory, Rowcliffes, & Rawle.*

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C. A. 1878 LUSH, J. *Oct.* 23. C. A. *Nov.* 2.

## *In re* IVORY. HANKIN *v.* TURNER.

[1878 I. 146.]

*Letters of Administration—Res Judicata—Practice—Security for Costs—Rules of Court*, 1875, *Order* LVIII., *r.* 15.

Letters of administration of the estate of an intestate were granted *ex parte* to the Defendant, as "his natural and lawful brother of the half blood." The Plaintiff, who was an uncle of the intestate, then commenced an action in the Chancery Division for the administration of the estate, alleging that the Defendant was illegitimate, and that he himself was next of kin; and moved for a receiver and an injunction:—

*Held*, by *Lush*, J., that the application must be refused, for that as long as the letters of administration remained in force they were conclusive evidence that the Defendant was one of the next of kin, and that the Plaintiff's proper course of procedure was to apply in the Probate Division to have them recalled.

The Plaintiff, who was in receipt of parochial relief, having appealed from this refusal, was ordered by the Court of Appeal to give security for the costs of the appeal, the Court being of opinion that the appeal was a speculative one.

*Per Cotton*, L.J.:—The insolvency of an Appellant is, *primâ facie*, a sufficient reason for ordering him to give security for costs.

Statement.

*JAMES IVORY* having died on the 2nd of September, 1878, intestate, letters of administration to his estate were, on the 30th of September, 1878, granted *ex parte* to the Defendant, as the intestate's "natural and lawful brother of the half blood."

The Plaintiff, who was the maternal uncle of the intestate, commenced an action in the Chancery Division on the 8th of October, 1878, against the Defendant for the administration of the personal estate of the intestate, and for a receiver and injunction, alleging the Defendant to be illegitimate and himself to be the sole next of kin.

On the 23rd of October, 1878, the Plaintiff moved before Mr. Justice *Lush* for a receiver and injunction.

*Phear*, for the motion.

*Marten*, Q.C., and *Jason Smith*, for the Defendant:—

The Court will not entertain an application which proceeds on the footing that the Defendant does not fill that character on the ground of which the Probate Division granted administration to him. The letters of administration are granted under statute, and if the Defendant was no relation he had no right to them. But the propriety of granting them cannot be disputed here. The granting administration, though without litigation, is a judicial act: *Allen* v. *Dundas* (1). The Court, in granting the letters, proceeded on the footing that the Defendant was a half-brother, and that amounts to a decision of the Court that he was so: *Barrs* v. *Jackson* (2); and that is conclusive till the letters are recalled. The Plaintiff is seeking to fix a trust on the Defendant on a ground which goes to the legal title as well as the beneficial title, and the Probate Division is the proper forum: *Meluish* v. *Milton* (3). The Court cannot go behind the letters of administration and treat them as good for one purpose and bad for another: *Pinney* v. *Hunt* (4).

*Phear*, in reply:—

The title claimed by the Defendant is twofold—legal and beneficial. I only dispute his beneficial title, and the Probate Division has not adjudicated upon that. Suppose a creditor obtained letters of administration, and then another creditor instituted an administration suit, and it ultimately turned out that the administrator was not a creditor, surely it would not be necessary to have the letters of administration revoked in order to prevent his obtaining payment. The *ex parte* statement of a person who obtains a grant of administration cannot estop other people. Again, if one of the next of kin obtained a grant of administration, alleging himself to be sole next of kin, would a grant to him

(1) 3 T. R. 125.
(2) 1 Ph. 582.
(3) 3 Ch. D. 27.
(4) 6 Ch. D. 98.

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as such preclude the other next of kin from obtaining their shares until the letters were revoked? If the Crown takes out administration on the ground that there are no next of kin, and then next of kin turn up, they always obtain their rights in an administration suit without any recall of the letters of administration. The only title conferred by the letters of administration is a legal title, and when granted *ex parte*, though it might be otherwise if the Plaintiff had been cited, they do not involve any adjudication on the beneficial title. The cases do not shew that the grant of probate is conclusive as to anything more than who is personal representative and what are the contents of the will, nor that the grant of administration is conclusive as to anything more than who is legal personal representative.

Judgment, Lush, J.

LUSH, J.:—

I am of opinion that this is not a question which this Court can entertain, and that this motion ought to be refused.

The application is, in substance, to revoke or to neutralize the letters of administration. This is not a case where the applicant claims community of interest with the administrator. If he had admitted that the administrator was one of the next of kin, alleging himself to be another, it would be a different matter; but his case is that the administrator is not of kin at all to the intestate, and therefore not entitled at all to the administration. This is not a special administration, nor is it a limited administration, but it is the ordinary administration granted under the statute. The statutes 31 Edw. 3, s. 1, and 21 Hen. 8, c. 5, s. 3, oblige the Court to grant administration to the next of kin, and it is only in default of any next of kin applying for it, and in case of their refusing to take out letters of administration, that administration may be granted to a creditor. The present administrator applied for letters of administration as the next of kin, and, as the next of kin, they were granted to him. If he was not the next of kin, the Probate Division has been deceived, and the application must be made to that Court to revoke its grant. It can only grant administration to the next of kin, and if the party applying is not the next of kin, the Court has no power to grant it to him; although, so long as the letters remain, they are binding upon this

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and every other Court. I do not think that that is now in issue. I do not say that it is not competent for this Court to try the matter since the *Judicature Act*, but the Probate Division is certainly the proper Division in which to try it. It is admitted by Mr. *Phear* that if the present applicant had been cited, and the Court had upon hearing the parties determined that the present administrator was the next of kin, that question could not be re-opened in any other Division of the High Court. There are abundant authorities for that proposition. Those authorities hold good notwithstanding that this was not a contentious suit, because the granting of the letters of administration is a judicial act of the Court, and if the Probate Division has been deceived, and granted them to the wrong persons, that Court is the proper tribunal to set the matter right and to grant administration to the right persons; but as long as these letters of administration are in force I do not think I can entertain the application here by Mr. *Phear's* client, which is in fact to make the Defendant a trustee for him, although he obtained the grant in another character. Mr. *Phear* says, give me all the assets and let him do all the duty. That is not the footing on which he applied for and obtained the letters of administration. The right to administration follows the right to the property, and if the party has no right to the property he has no right to the letters of administration. I think that the application must be to the Probate Division to revoke the letters of administration now existing and to grant them to Mr. *Phear's* client as sole next of kin.

The motion will be refused with costs.

C. A.

The Plaintiff appealed from this refusal. On the 2nd of November the Defendant moved that the Plaintiff might be ordered to give security for the costs of the appeal. It was deposed to, and not denied, that the Plaintiff was a pauper receiving outdoor parish relief.

Argument.

*Marten*, Q.C., and *Jason Smith*, for the motion, referred to Order LVIII., r. 15.

*Phear*, for the Plaintiff:—

Poverty alone is not a sufficient ground for ordering security for

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costs, as was held by the Court of Appeal in *Usil* v. *Brearley* (1). The appeal here is reasonable. I am not seeking to interfere with the appointment of the administrator by the Probate Division, and there is therefore no sufficient ground why I should be put to proceed in that Division. I am only asking to have the assets administered according to the true beneficial title. The object of this application is only to embarrass the Plaintiff, for the appeal might be heard at no greater expense than the present motion.

Judgment, C. A. Earl Cairns, L.C.

EARL CAIRNS, L.C.:—

I entertain no doubt that this is a case in which security for the costs of the appeal ought to be given. The circumstances are singular. The Plaintiff alleges that he stands in a particular relationship to the deceased; that he was his maternal uncle, and is his next of kin or one of his next of kin. The Defendant alleges that he is the half-brother of the deceased, and is his next of kin or one of his next of kin, and has obtained letters of administration on that footing. The Plaintiff says that the Defendant is illegitimate, and therefore not one of the next of kin; he takes no step to have the letters of administration recalled, but his case is, "I am entitled to sue you here, and call upon you to administer the property which you hold under an instrument alleging you to be one of the next of kin in a manner wholly inconsistent with your being one of such next of kin." This seems an attempt to do what is called in Scotch law approbating and reprobating, to claim the benefit of the services of the Defendant upon the footing of his being a legitimate relation of the intestate, and to assert at the same time that he is not such a relation. The person conducting this contest is stated in evidence to be a pauper receiving parochial relief, and this evidence is not rebutted. It is not necessary to decide, and I do not wish to decide, what does not arise, whether in every case where the Appellant is a pauper the Court will require security for costs; but, certainly, where a pauper comes forward to engage in such a contest as this there are special circumstances which will induce the Court of Appeal to order him to give security.

(1) 3 C. P. D. 206.

BAGGALLAY, L.J. :—

I agree that in circumstances such as those of the present case security ought to be given.

BRETT, L.J. :—

I am of the same opinion.

Judgment, C. A. Brett, L.J.

COTTON, L.J. :—

Cotton, L.J.

I also am of the same opinion. I think that the insolvency of an Appellant is *primâ facie* a sufficient reason for ordering him to give security for costs, though in some cases the Court may not order him to do so. In the present case there is nothing to exempt him from giving security.

The Appellant was ordered to deposit £20 in Court, and having failed to do so, the appeal was on the 27th of November dismissed for want of prosecution.

Solicitors: *W. Millman; W. Richard Preston.*

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## BROWN *v.* SMITH.



[1873 B. 301.]

*Infant—Maintenance—Allowance for Past Maintenance.*

A person who was tenant for life under a will of a property producing a net income of about £140, died insolvent in 1853, leaving a daughter not a year old, who thereupon became entitled to the property, and a widow. The father was the son of a retired tradesman in a small way of business. In November, 1853, the widow being wholly without means of support, an order was made directing the whole income to be applied for the maintenance of the infant, and directing the two persons who were trustees of the will to pay it to the widow for that purpose. One of the trustees died in 1861. In 1863 the widow married a gentleman of good position but small means. No fresh application to the Court was made, but the surviving trustee went on paying the whole income to the mother till 1873, when the daughter came of age. The daughter then filed her bill, alleging that after her mother's second marriage the payment of the whole income to her was improper, and asking to have an account of the past income, and to have the balance of it paid to herself after deducting a proper allowance for her

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maintenance and education. It was shewn that the Plaintiff had been well educated, and had lived as a lady, that her social position had been much improved by her mother's marriage, and that the income, so far as not expended on herself personally, had been applied towards the expenses of the stepfather's establishment, of which she had the benefit:—

*Held*, by the Master of the Rolls, that the order for maintenance ceased to be operative on the death of one of the trustees, but that the allowance of the whole income for maintenance would, under the circumstances, have been sanctioned by the Court if applied to on the death of the trustee, and again on the mother's marriage, and that the whole income ought, therefore, now to be treated as having been properly applied.

On appeal, the decision that the income ought to be treated as properly applied was affirmed, but the Court was of opinion that the order for maintenance had come to an end only on the marriage of the mother, and not on the death of the trustee.

Statement.

*JOHN RATTRAY* died on the 25th of May, 1853, intestate and insolvent. He had been tenant for life of real and personal estate under two wills, of which *Mark Smith* and *Michael Paterson* were the trustees. Upon his death this property devolved upon his daughter and only child, the Plaintiff, as regards the personalty absolutely and as regards the realty in tail. She was born on the 29th of July, 1852. The gross income of the property was about £160, and the net income about £140.

On the 17th of June, 1853, the trustees of the wills applied in Chambers, in the matter of the infant, for an order for a guardian and maintenance. By the direction of the Judge the summons was amended by making it an application by the infant by her next friend, and, upon evidence that the infant's mother was wholly without means of support, Vice-Chancellor *Stuart*, on the 8th of November, 1853, made an order that the whole of the income should be allowed for the maintenance and education of the Plaintiff from the death of her father, and should be paid by *Smith* and *Paterson* to the mother for that purpose during the minority of the Plaintiff, or until further order.

*Paterson* died on the 4th of March, 1861. In 1863 Mrs. *Rattray* married Captain *Weatherley*. No application was made to the Court, but *Smith*, without any further order, continued to pay the whole income of the property to Mrs. *Weatherley* until July, 1873, when the Plaintiff attained twenty-one. Captain *Weatherley* died in 1872, and Mrs. *Weatherley* was his executrix. The Plaintiff,

until she attained twenty-one, resided with her mother before, during, and after the second coverture.

On the 29th of July, 1873, the Plaintiff intermarried with *Thomas Watson Brown*, and on the 11th of September, 1873, filed her bill against *Mark Smith*, Mrs. *Weatherley*, and the representatives of *Paterson*, alleging that after Mrs. *Weatherley's* second marriage the payment of the Plaintiff's whole income to Mrs. *Weatherley* was improper, and that the balance of such income, after deducting £50 a year, or such sum as the Plaintiff's maintenance and education cost, or ought to have cost, ought to be repaid out of the assets of *Weatherley*, so far as he received it, and by Mrs. *Weatherley*, so far as she received it, and ought, if necessary, to be decreed to be made good by the trustees, and praying for relief on that footing.

On the 17th of December, 1875, the cause came on before the Master of the Rolls, who was of opinion that on the death of *Paterson* an application ought to have been made to the Court to sanction the continuance of the payments by the surviving trustee, and that the payments from that time were made without authority. His Lordship made a decree containing an inquiry "whether the whole of the net income of the Plaintiff, after expenses and repairs as from and after the 4th of March, 1861, the date of the death of the said *Michael Paterson*, was, under the circumstances, proper to be allowed for the maintenance and education of the Plaintiff during her minority, and if not, to inquire how much is proper to be allowed, and, if it shall be found that the whole of such net income was not proper to be allowed, then" an account was directed of income of the Plaintiff come to the hands of *Mark Smith* and of Mr. and Mrs. *Weatherley* after the 4th of March, 1861, during the minority of the Plaintiff.

The Chief Clerk, on the 27th of May, 1878, certified that the whole of the net income of the Plaintiff from and after the 4th of March, 1861, was, under the circumstances, proper to be allowed for her maintenance and education during her minority. The Plaintiff applied to vary this certificate.

Upon this inquiry the Plaintiff made an affidavit complaining very much of the way in which she had been treated during her minority, and aiming at shewing that nothing like the whole

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Statement.

amount of the income had been expended in her maintenance and education, a proper allowance for which, she contended, would be £80 a year. It appeared that the Plaintiff's father, who, as above stated, had died insolvent, was the son of a tradesman who had retired upon a very small property. Captain *Weatherley*, who had been a captain in the *Northumberland Militia*, was a gentleman moving in good society, though his means were not large; and several independent witnesses, who had been friends of his, deposed that the Plaintiff had been educated as a lady, was always dressed as such, brought into good society, and treated by her stepfather with great kindness, and that her social position had been very much improved by her mother's marriage.

The summons to vary was heard before the Master of the Rolls on the 8th of July, 1878.

Argument.

*Waller*, Q.C., and *Bunting*, for the application to vary the certificate:—

The Chief Clerk's certificate ought to be varied, as the whole of the Plaintiff's net income, amounting to about £140 a year, was much more than was necessary for her maintenance, and more than ought to have been allowed to Mrs. *Weatherley*. So much of the income paid to her since her marriage as is shewn by the evidence not to have been expended for the Plaintiff's maintenance or benefit ought to be disallowed.

*Marten*, Q.C., and *Phillpotts*, for the mother.

*Roxburgh*, Q.C., and *Russell Roberts*, for the surviving trustee.

*Chitty*, Q.C., and *Crossley*, for the representatives of the deceased trustee.

Judgment, M.R.

JESSEL, M.R., after stating the circumstances of the case, continued:—

The question I have to consider is, whether a fair allowance was made to the mother under all the circumstances, and whether the child was fairly and properly maintained and educated. It is not the practice of the Court when it allows these moderate sums of £100 or £200 a year to a parent or relative to inquire too

minutely into the mode in which the sum is expended. It is supposed that the person who takes that child into his or her house does not keep separate accounts of every item of rent and taxes, of every bit of furniture bought for the use of the infant, or bought for the use of other people, and of the number of rides in the carriage the infant takes as compared with the other members of the household. That is not the meaning of it. What the Court does is to allow a fair sum for the maintenance and education of the infant, and to see that the infant is fairly maintained and educated having regard to the sum allowed. The Court frequently allows a larger sum than is actually required for the maintenance of the infant on purpose. For instance, it may be that it is more to the advantage of the infant to pay the larger sum in order to induce the person to take the infant. I will give an illustration of that by mentioning a case which occurred not very long ago in my Chambers. There was a young lady of very large fortune who had attained an age at which it was desirable to introduce her into society. She had neither mother nor father. It was represented to me that a lady of excellent rank, but whose income was by no means such as to enable her to live in the style she desired to do, was willing to take the young lady and introduce her into society on receiving a very considerable allowance. On considering it, I came to the conclusion that it was a very desirable arrangement for the young lady, and I made this allowance, which was more than was required for the infant, the balance being expended on the establishment, which would, no doubt, ultimately tend to the infant's benefit, although the sum expended very much exceeded anything which was the actual cost of the infant's maintenance.

In all these matters we look to the infant's benefit. It constantly happens in the case of relatives that they would be willing to take the infant as a member of their family. Nothing would be more advantageous for an orphan girl, for instance, than that she should be brought up by a relative, and with her cousins and other relatives; but you cannot expect that a person would take the infant for the bare cost of her maintenance and education; as a general rule this would not be done; and then the question arises, how much is it worth the while of the guardian to pay,

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having regard to the interest of the infant, over and above the cost of maintenance, to induce these people to undertake the charge.

In the case of girls, I have been often willing to pay a very considerable sum, because I know how essential it is for their interest that they should have around them the protection of members of their own family of mature age who have an interest in their welfare, and who would guard them from the numerous temptations and dangers to which girls between the ages of sixteen and twenty-one are especially liable. It by no means follows that it was not a proper thing, and not the best thing in the world, to pay to the stepfather more than the cost of the infant, in order to procure the right to remain in his house, and to visit with his friends, and to enjoy the society and other advantages which are annexed to such a position. I think it is wrong to reckon up the number of shillings or the number of pounds exactly that the infant costs. You must look at the whole circumstances together, and say whether the allowance made was not a fair allowance. Looking to these circumstances, having regard to the evidence which has been adduced, and not saying a word against the desire to tell the truth on both sides (I think probably some deduction should be made from the statements of both sides), I do not think the Court would have hesitated for one moment in granting this allowance of £135 or thereabouts for the maintenance of the young lady until she attained the age of twenty-one. I think it not only not an unfair allowance, but a fair and moderate allowance. Therefore I think the Chief Clerk's certificate must be affirmed with costs.

C. A. The Plaintiff appealed from this decision. The appeal was heard on the 5th of November.

Argument. *Waller*, Q.C., and *Bunting*, for the Appellant:—

The order for payment to the mother came to an end by the death of one of the trustees, as the direction to pay was only given to the two, and the Master of the Rolls so held.

[BAGGALLAY, L.J.:—Can that be so in the case of a mere order to make payments to a third person?

COTTON, L.J.:—A power given by the Court to two persons

would no doubt come to an end by the death of one; but I do not agree that such is the case with a positive direction to do an act involving no discretion.]

At all events the direction to pay to the mother became inoperative on her marriage. A fresh state of circumstances then arose, which ought to have been brought to the attention of the Court. A large allowance had been made because it was considered for the benefit of the child to remain with the mother, and it was necessary to allow enough to maintain her as well as the child; but she might have married a millionaire, in which case the reason for so large an allowance would clearly have ceased. The Master of the Rolls treated this as a case of prospective maintenance; but we say that it is a case of past maintenance, and that *Bruin* v. *Knott* (1) applies. That case decides that in allowing past maintenance you cannot go beyond what has actually been expended, and here we have evidence to shew that not nearly the whole income was expended for the benefit of the Plaintiff.

Argument.

[BAGGALLAY, L.J.:—Does not the form of the inquiry assume that the whole income has been expended?

COTTON, L.J.:—My present impression is that this inquiry answers to that directed by the Vice-Chancellor in *Bruin* v. *Knott*, and not to that directed by the Lord Chancellor.]

We submit that it is substantially the same as that of the Lord Chancellor, and leaves the question open whether the whole income has been expended on the minor; and the evidence shews that the expenses of her maintenance and education amounted to far less than the whole income.

*Roxburgh*, Q.C., and *Russell Roberts*, for the surviving trustee;

*Chitty*, Q.C., and *Crossley*, for the representatives of the deceased trustee; and

*Marten*, Q.C., and *Phillpotts*, for the mother, were not called upon.

BAGGALLAY, L.J.:—

Judgment, C. A. Baggallay, L.J.

At the hearing of this cause the Master of the Rolls directed an

(1) 1 Ph. 572.

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inquiry whether the whole of the income as from the 4th of March, 1861, was, under the circumstances, proper to be allowed for the maintenance and education of the Plaintiff. This inquiry has been answered in the affirmative, the certificate has been confirmed by the Master of the Rolls, and I entertain no doubt that his Lordship was right in dismissing an application to vary it. The circumstances of the case are peculiar. The order made by Vice-Chancellor *Stuart* in 1853 was one quite in accordance with the practice of the Court. Where the mother of an infant has no means the Court will grant her an allowance out of the infant's income beyond what would be the expense of having the child maintained by a stranger, it being considered to be for the benefit of the child that it should reside with the mother, and that the allowance should be of such an amount as to make this practicable. The order directed that the whole income should be allowed for the Plaintiff's maintenance and education, and directed the trustees to pay it to the mother for that purpose until the infant attained twenty-one, or until further order. One trustee died in 1861, and the survivor continued to make the payments. A suggestion has been made that the order ceased on the death of one of the trustees, because it was an order upon the two. It is not, in my opinion, necessary to decide that question; for if a surviving trustee goes on making payments which the two have been ordered to make, without any discretion being given to them, he ought, in my opinion, to be indemnified in respect of the payments so made by him. A more serious question is, whether the order did not cease to be operative upon the mother marrying. I am of opinion that it did, and that the proper course would have been for the surviving trustee, or the next friend, to bring the case before the Court. We must then consider what the Court would probably have done if the matter had been brought before it. The Court had thought it right during the child's early infancy to allow the whole income, having regard to its being for the child's benefit to live with the mother. Suppose the mother had died, and a proposal had been made that the child should be placed with a married woman whose husband was in the same social position as Captain *Weatherley*, and that the whole income should be allowed for her maintenance and education. I think the Court would have sanctioned such a scheme as being for the

infant's benefit. If in such a case the Court would have allowed the whole income, would it not have done so in the case, which happened, of the mother marrying a gentleman of good position, but small means. The advantages the infant enjoyed in his house, where it is shewn that she was treated with great kindness and brought up as a lady, could not have been obtained if only a sum sufficient for her bare maintenance had been allowed. I collect from the judgment of the Master of the Rolls that this was his view when he directed the inquiry in the decree. We, however, have now only to deal with the answer to that inquiry; we cannot consider whether the inquiry is in the proper form, as there is no appeal from the order directing it. *Bruin* v. *Knott* (1) has been referred to, but I am not sure that it is applicable. In that case the mother had applied money for the child's maintenance without any authority. She might not have expended as much as the Court if applied to would have allowed, and if she had not expended the whole there was no reason why she should be allowed the whole. Here there is no doubt that the whole sum was expended, for it is not attempted to shew that the mother made savings out of it. We must proceed then on the footing that the whole was expended in keeping up the establishment of the mother and stepfather, of which the Plaintiff had the benefit. Did the Plaintiff thus receive a benefit which she would not have had if confined to the sum necessary to be expended directly on herself? It appears to me that she clearly did, and that the course of proceeding adopted was to her advantage. There was an irregularity in not applying for directions on the mother's marriage, but I think that the expenditure was such as the Court, if then applied to, would have sanctioned, and that neither the trustee nor the persons to whom he paid the income can be held to be subject to any liability in respect of it.

Judgment, C. A. Baggallay, L.J.

BRETT, L.J.:—

Brett, L.J.

The inquiry under which the certificate before us was made was directed after the whole income had been expended without the sanction of any order that remained in force, the order having become inoperative by the marriage of the mother, and it is

(1) 1 Ph. 572.

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Judgment, C. A. Brett, L.J.

therefore an inquiry as to past maintenance. It appears to me, whether *Bruin* v. *Knott* (1) supports that view or not, that there must be a great difference between the cases of future and past maintenance. In the first case there cannot be any inquiry as to what has been expended, but only as to what ought to be allowed to be expended. In the second case two questions arise, first, what would the Court have allowed; and, secondly, what amount has been expended. The Court cannot allow the trustee all he has expended if he has expended more than it would have sanctioned; and it cannot allow him as much as it would have sanctioned if he has not expended so much. One phrase may comprise both or only one of these questions. "What is proper to be allowed" may mean "what do I now judge that the Court would have allowed if applied to at the time," or "what amount ought now to be allowed to the trustee in passing his accounts." I take it in favour of the Plaintiff that the inquiry in the decree meant what ought now to be allowed to the trustee so as to include the two questions. If that is not the true construction of the order the Plaintiff is driven to the contention that the order left the wrong question to the Chief Clerk, which contention cannot be raised, as there is no appeal from the decree. But I take it, as I said, to include the two questions. Now, on the evidence it is clear that the money was expended. If any of it had been applied in making up a purse for the mother, the case would have been entirely different, but it is clear that the whole money was expended either in the maintenance and education of the Plaintiff, or in keeping up the establishment of which she had the benefit. It is urged on her behalf that nothing ought to be allowed but what was directly expended on herself. That is not the right way of looking at the case, we must consider what the Court would have allowed, having regard to the advantage of her living in a family in this position. I think the test proposed by the Lord Justice *Baggallay* is the true one: What would the Court have allowed to secure to the young lady the advantage of being brought up in such a family as this if they had been strangers? and I cannot doubt that the Court would have allowed the whole income. The decision of the Master of the Rolls, therefore, appears to me clearly right.

(1) 1 Ph. 572.

COTTON, L.J.:—

Judgment, C. A. Cotton, L.J.

The only question before us is, whether a right answer has been given to the inquiry. If that inquiry was not such as to leave it open to the Plaintiff to raise some of the questions which have been argued, we cannot alter it. I give no opinion whether the case of *Bruin* v. *Knott* (1) is applicable. The trustee in the present case paid the income of the Plaintiff's property to the mother, under the mistaken idea that the order which had been made authorized such payment, which after the marriage of the mother was not the case. I give no opinion whether the inquiry directed by the Master of the Rolls was in substance the same as that of the Vice-Chancellor in *Bruin* v. *Knott*, or was to the same effect as that of the Lord Chancellor. I will assume that it was of the latter character. The money was expended for the purposes of the establishment of which the Plaintiff had the benefit. If the mother had made a purse out of it, very different considerations would have arisen. It is clearly shewn that the Plaintiff was educated properly and brought up as a lady, in a way much superior to what was to be expected from the circumstances of her father and the amount of her property. Then, adopting the principle of *Bruin* v. *Knott*, we have the question, was this money expended for the benefit of the infant, and was it properly so expended? I am of opinion that both questions must be answered in the affirmative, and that the decision of the Master of the Rolls is right. Having regard to the circumstances, I think that the income was expended in a way which the Court would have sanctioned if an application had been made at the time of the mother's second marriage.

The appeal was dismissed with costs, and liberty was given to apply at the Rolls for payment out of the estate of such costs as could not be recovered from the next friend, the Court intimating some doubt whether such an application would be successful as to the representatives of the deceased trustee.

Solicitors: *J. W. Hickin; R. W. Busby; Smith, Fawdon, & Low.*

(1) 1 Ph. 572.

C. A.
1878
V.-C. B.
*July* 18.
C. A.
*Nov.* 13.

## *In re* LEADBITTER.

*Taxation of Costs—Bill of Costs paid by Trustee in Bankruptcy—Application for Taxation by discharged Bankrupt—Solicitors Act* (6 & 7 *Vict. c.* 73), *s.* 39.

A bankrupt who has obtained his discharge and who has become entitled to the surplus of his estate, all the creditors having been paid in full, is not entitled, under the 39th section of the *Solicitors Act* (6 & 7 Vict. c. 73), to obtain the taxation of a bill of costs paid by the trustee in the bankruptcy.

The trustee in bankruptcy does not stand in the position of a trustee for the bankrupt.

Statement.

THIS cause came before Vice-Chancellor *Bacon* on an adjourned summons taken out by *John Patterson* for the delivery by Messrs. *Leadbitter & Harvey* of a bill of costs for taxation.

The applicant had mortgaged certain property at *Newcastle-upon-Tyne*, and Messrs. *Leadbitter & Harvey* were the mortgagees' solicitors.

The applicant was adjudicated bankrupt in or about December, 1876, and Mr. *Smithson* was appointed trustee.

During the bankruptcy the mortgaged property was sold by the trustee with the concurrence of the mortgagees. The sale was completed on the 9th of May, 1877, and *Smithson* paid the bill of costs of Messrs. *Leadbitter & Harvey*, who acted as the solicitors of the mortgagees, amounting to £79 18*s.* 2*d.*, out of the proceeds of the sale. On the 8th of June, 1877, the bankrupt obtained his discharge. The creditors of the bankrupt were ultimately paid in full.

The present notice of motion was dated the 8th of May, and was served on the Respondents on the 11th of May, 1878.

The summons was heard before Vice-Chancellor *Bacon* on the 18th of July, 1878.

Argument.

*Oswald*, for the applicant:—

Although the notice of motion was not served till the 11th of May, 1878, that is to say, two days after the expiration of a twelvemonth from the 9th of May, 1877, when the bill was

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*In re* LEADBITTER.

paid, the notice of motion was dated the 8th of May, and hence was within the twelvemonth; and that time is to be reckoned back from the date of the summons, and not from the date of service, appears by analogy from *Sayer* v. *Wagstaff* (1); *In re Corporation of Huddersfield and Jacomb* (2); *Blunt* v. *Heslop* (3).

Argument.

That being so, and *Smithson* having been constituted by the *Bankruptcy Act* the applicant's trustee, this bill was in fact paid by the applicant's trustee out of the applicant's money, and hence the case is within sects. 39 and 40 of the *Solicitors Act* (6 & 7 Vict. c. 73). Being entitled under the *Bankruptcy Act*, 1869, s. 45, and rule 137 of the Bankruptcy Rules, 1870, to the surplus, after all money debts were paid, the applicant is "a party interested" within the 39th section of the *Solicitors Act*, and is entitled to have this bill taxed: *In re Blackmore* (4); *In re Drake* (5).

*Millar*, for the Respondents, was not called upon.

Judgment, V.-C. B.

BACON, V.C.:—

In my opinion the applicant is entitled to no such thing.

The fallacy of the argument is that this bill of costs was paid by the applicant's trustee. The applicant in effect says, "This money was paid by my trustee out of my property." But the statute has no application to the case of a trustee in bankruptcy. The trustee in bankruptcy was not the applicant's trustee—the property was not the applicant's property. It was the property of his creditors; and the money was paid out of that which had been once, but had ceased to be, the applicant's estate. The applicant, at the time of payment, had no present interest in it, nor in any particle of it.

In my opinion the applicant cannot be said to come within either the 38th, 39th, or 40th section of the *Solicitors Act*. When this payment was made the applicant had no interest. He was not "a party interested" within the 39th and 40th sections of the

(1) 5 Beav. 415.
(2) Law Rep. 10 Ch. 92.
(3) 8 A. & E. 577.
(4) 13 Beav. 154.
(5) 22 Beav. 438.

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Act. When the discharge was granted, he became entitled to the surplus, no doubt, but the property out of which this payment was made by the trustee was not his property.

It becomes unnecessary to decide the other point that was mentioned, as to the time within which this application was made.

The application must be refused with costs.

C. A.

From this decision *Patterson* appealed. The appeal was heard on the 13th of November.

Argument.

*Oswald*, for the Appellant:—

Wherever there is a surplus after paying the bankrupt's creditors in full, the bankrupt has an interest in the estate, because he is entitled to the surplus, and the trustee in the bankruptcy stands in a fiduciary relation to him in respect of the property. Therefore the requirements of the 39th section of the *Solicitors Act* are fulfilled, and the bankrupt has a right to have the bill of costs taxed.

[JESSEL, M.R.:—It was decided in *Rochfort* v. *Battersby* (1) that an assignee in insolvency was not a trustee for the insolvent. There is no difference between an assignee in insolvency or bankruptcy and a trustee in bankruptcy.]

Assuming that an assignee in insolvency or bankruptcy was not a trustee within the 39th section of the *Solicitors Act*, it does not follow that a trustee under the present *Bankruptcy Act* is not. The Legislature, in changing the name, have recognised a fiduciary character in the office.

*Millar*, for the Respondents, was not called on.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

I am of opinion that the decision of the Vice-Chancellor was correct. The simple question is, whether a bankrupt after his discharge, where the creditors have been paid in full and, therefore, the surplus, if any, belongs to the bankrupt, has the right, under

(1) 2 H. L. C. 388.

the 39th section of the *Solicitors Act*, to apply for the taxation of a bill of costs paid by the trustee in the bankruptcy to the solicitor of a mortgagee of the bankrupt on the occasion of paying off the mortgage debt, which was done during the pendency of the bankruptcy and before the discharge of the bankrupt. I agree with the Vice-Chancellor that the bankrupt has no such right. The supposed right is given by the 39th section of the *Solicitors Act*, which says, "that it shall be lawful in any case in which a trustee, executor, or administrator has become chargeable with a bill of costs, for the Lord Chancellor, &c., upon the application of a party interested in the property out of which such trustee, executor, or administrator may have paid or be entitled to pay such bill, to refer the same to be taxed." It has always been held that the words "party interested" mean a party interested under the trust, deed, will, or intestacy; and, of course, the "trustee" must be a person really chargeable with the bill of costs. At the time when the Act was passed these words could not describe an assignee in bankruptcy, but it was contended that they would now include a trustee in bankruptcy. But although the name has been changed, and the assignee is now called a trustee, the relative position of the bankrupt and his trustee is the same as that which formerly existed between the bankrupt and his assignee. We must, therefore, look at the real meaning of the Act when it was passed, and it is quite plain that it could not have been meant to include a person in the position of a trustee in bankruptcy. The mere change of name of the assignee cannot alter the meaning of the Act.

In the second place, the bankrupt is not a "person interested" in the property out of which the bill was paid. At the time when the bill was paid there was no surplus, but only a possibility of a surplus. A legacy might be left, or a reversion might fall in, but at most there was no more than a probability of a surplus. There was no surplus till all the debts had been paid in full; therefore, pending the bankruptcy, the bankrupt was not a person interested in the property; the probability of a surplus could not make him so. This has been settled by other cases, especially by *Rochfort* v. *Battersby* (1), where it was held that an insolvent was not entitled

(1) 2 H. L. C. 388.

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Judgment, C. A. Jessel, M.R.

to any of the rights of a *cestui que trust*. He could have no relief against the assignee in the Court of Chancery.

There is also another objection to this application arising out of the facts in this particular case, namely, that the trustee did not employ the solicitor at all, and, therefore, was not the party chargeable with the bill of costs. The mortgagee might have retained the amount out of the mortgaged estate, but there was no personal liability against the trustee. The section only applies to a person employing a solicitor himself, and he is only liable on his own retainer. The executor is in a different position, he stands in the place of his testator; but it could never have been intended that an assignee or trustee in bankruptcy should be treated as a party chargeable under the retainer of the bankrupt.

The decision of the Vice-Chancellor must be affirmed, and the appeal must be dismissed with costs.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion. It is observable that the 18th section of the *Bankruptcy Act*, 1869, says that the Court is to give a certificate declaring the trustee to be a "trustee of the bankruptcy;" and I am of opinion that the trustee of the bankruptcy is not a trustee for the bankrupt during the pendency of the bankruptcy within the meaning of the 39th section of the *Solicitors Act*. No doubt the property remaining at the close of the bankruptcy may revert to the bankrupt, but he will then take it as a successor to the trustee. During the pendency of the bankruptcy the trustee is a trustee for the creditors, not for the bankrupt.

Thesiger, L.J. THESIGER, L.J.:—

I am of the same opinion. It is not necessary to determine exhaustively to what cases the 39th section extends. It is sufficient to say that it does not extend to the relation between a trustee in bankruptcy and the bankrupt, although there may be a surplus. It was contended by the counsel for the Appellant that, admitting that under the bankruptcy law as it existed in 1843, where assignees were appointed no question could have arisen, the case is different with respect to a trustee under the present law of bankruptcy. The answer to that is, that although there has been a change of

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name there has been no change in substance; the relation between the parties is the same; and as an assignee did not come within the section of the *Solicitors Act*, it follows that a trustee is not within the section.

Solicitors: *Pitman & Lane*, agents for *W. S. Young*, *South Shields*; *E. Flux & Leadbitter*, agents for *Leadbitter*, *Harvey*, & *Smithson*, *Newcastle*.

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## TILDESLEY *v.* HARPER.

C. A. 1878 *Nov.* 18.

[1876 T. 67.]

*Pleading—Leave to amend—Evasive Denial—Rules of Court*, 1875, *Order* XIX., *rr.* 17, 22.

In an action against a lessee to set aside a lease granted under a power, the statement of claim stated that the donee of the power had received a specified sum as a bribe, and stated the circumstances; the statement of defence denied that that particular sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given. *Fry*, J. having held that the denial was evasive, and amounted to an admission that some bribe had been given, and having refused leave to amend the statement of defence:—

*Held*, by the Court of Appeal, that leave to amend the statement of defence ought to be given.

*Per Bramwell*, L.J.:—As a general rule leave to amend ought not to be refused unless the Court is satisfied that the party applying is acting *malâ fide*, or that his blunder has done some injury to the other side which cannot be compensated by payment of costs or otherwise.

Whether the Defendant ought on the pleadings to be held to have admitted the acceptance of some bribe, *quære*.

Statement.

THIS was an appeal from a judgment of Mr. Justice *Fry* (1).

The action was brought by *Matthew Tildesley*, the executor and trustee of the will of *Mary Hitchcocks* and several infants, *cestuis que trust* under the will, against certain mortgagees, and against *W. H. Anderson*, a lessee, claiming to have the mortgages and the lease set aside. As to the lease the statement of claim stated that *Mary Hitchcocks* by her will authorized and empowered *Matthew Tildesley*, or other the trustees of her will, to demise and lease all or any part of her real estate to any person or persons

(1) 7 Ch. D. 403.

C. A. 1878 TILDESLEY v. HARPER. Statement.

for any term or number of years not exceeding twenty-one years, so that in every such case there should be reserved the most improved yearly rent that could be reasonably obtained for the same; that a part of the estate of the testatrix consisted of a freehold inn called the *Golden Fleece*, and two houses behind it; and that by an indenture of lease dated the 31st of December, 1873, *Matthew Tildesley*, in alleged exercise of the power in that behalf contained in the aforesaid will, purported to lease the inn and the two houses to *W. H. Anderson* for twenty-one years, at £200 a year rent. The statement of claim then stated as follows: "When such alleged lease was granted the Defendant *Anderson* knew that the Plaintiff *Matthew Tildesley* was a trustee only of the said *Golden Fleece Inn* and premises, with a power of leasing. The said rent of £200 was not, and both the Plaintiff *Matthew Tildesley* and the Defendant *Anderson* knew it was not, the most improved rent that at the date of such lease could have been obtained for the said premises. Such premises were at the date of such lease, as they are now, worth £350 per annum or thereabouts. The Defendant *Anderson*, however, knowing as he did that the Plaintiff *Matthew Tildesley* was in straitened circumstances at the time, offered him the said *Matthew Tildesley* personally a bonus, and in fact a bribe, of £500 if he would grant him the said lease for twenty-one years at the rent of £200, and arranged to give him such sum of £500 if he would grant such lease, and the Plaintiff *Matthew Tildesley* being at the time very hard pressed for money accepted such offer and assented to such arrangement, and in fact granted *Anderson* the said lease in consideration of such bribe and in pursuance of such arrangement. And the Defendant *Anderson* has in pursuance of such arrangement and in fact paid to the Plaintiff *Matthew Tildesley* £200, part of the said £500. Under the above circumstances the Plaintiffs charge that the said lease was not granted *bonâ fide* nor in a proper exercise of the said power of leasing, and that it is not binding on the Plaintiffs, and ought to be set aside."

The statement of defence of *W. H. Anderson* was as follows:— "The said rent of £200 was the most improved rent that at the date of such lease could have been obtained for the said premises. The Defendant *William Henry Anderson* denies that such pre-

mises were at the date of such lease worth £350 per annum or thereabouts. The Defendant *William Henry Anderson* denies that he knew that the Plaintiff *Matthew Tildesley* was in straitened circumstances at the time. The said Defendant denies that he offered the said Plaintiff personally a bonus and in fact a bribe of £500 if he would grant him the said lease for twenty-one years at the rent of £200, and that he arranged to give him such sum of £500 if he would grant such lease, and that the said Plaintiff, being at the time very hard pressed for money, or in fact accepted such offer and assented to such arrangements, and in fact granted the said Defendant the said lease in consideration of such bribe and in pursuance of such arrangement. The said Defendant denies that he has in pursuance of such arrangement and in fact paid to the said Plaintiff *Matthew Tildesley* the sum of £200, part of the said sum of £500."

Statement.

The Plaintiff replied to the defence, and both parties went into evidence. The Defendant *Anderson* filed an affidavit, in which he distinctly denied having given any bribe at all.

When the action came on for trial Mr. Justice *Fry* was of opinion that the giving of a bribe was not sufficiently denied by the statement of defence, and must be taken to be admitted under Order XIX., rule 17, and he refused to give the Defendant leave to amend his defence, but at once gave judgment for the Plaintiffs.

From this decision the Defendant *Anderson* appealed.

*Fischer*, Q.C., and *C. Herbert Smith*, for the Appellant:—

Argument.

The Defendant has sufficiently denied the charge of bribery made in the Plaintiffs' statement of defence, for he has categorically denied each of the allegations. Even if there is no denial of having given some bribe, that is not an admission of the fact, for the mere omission to deny a fact is no admission of it unless the fact is alleged in the statement of the other party. This is shewn by Order XIX., rule 17. And so the Plaintiffs understood the effect of the defence, otherwise they would have moved for judgment on the admissions under Order XL., rule 11. Instead of which they have joined issue and put the Defendant to the expense of bringing up his witnesses.

If the Judge was right in his view of the pleadings, he ought

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to have given the Defendant leave to amend. By his refusal great hardship has been inflicted on the Defendant, who has been, from a mere slip in the pleading, deprived of his lease, under which he has expended considerable sums, and also deprived of the opportunity of meeting the charge of bribery. There can be no question of the *bona fides* of the defence, because the Defendant, before he knew that the statement of defence would be objected to as insufficient, had filed an affidavit denying the charge of bribery altogether.

*Cookson*, Q.C., and *Maclean*, for the Plaintiffs:—

Under the present system the rules as to pleading are to be construed strictly: *Thorp* v. *Holdsworth* (1). With respect to the leave to amend, it is entirely within the discretion of the Judge. His Lordship, on considering the whole of the pleadings, came to the conclusion that the defence as to the charge of bribery was not *bonâ fide*, and the Court of Appeal ought not to interfere with his discretion.

THE COURT having intimated a strong opinion that leave to amend ought to have been given, they declined to argue the question further.

Judgment, Baggallay, L.J.

BAGGALLAY, L.J.:—

We all think that leave to amend ought to be given. The order will be to discharge the judgment of Mr. Justice *Fry*, with liberty to the Defendant to amend his statement of defence; the Plaintiffs to pay the costs of the appeal; and the costs of the day of trial in the Court below to be costs in the cause. The Plaintiffs will also be at liberty to amend their pleadings.

Bramwell, L.J.

BRAMWELL, L.J.:—

I think Mr. *Cookson* has exercised a wise discretion in retiring from the discussion. In my opinion the Defendant ought to have been allowed to amend his statement of defence. I have had much to do in Chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give

(1) 3 Ch. D. 637.

leave to amend unless I have been satisfied that the party applying was acting *malâ fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. I confess that if the present case had come before me I should have had some doubt whether the Defendant had made a *bonâ fide* mistake, as the mistake is so very obvious. I should probably have required some affidavit or statement by the solicitor to shew that the slip in the pleading was a *bonâ fide* one, and if satisfied on that point, I should not have refused leave to amend. Mr. Justice *Fry* seems to have thought it right to trust to his own strong impression that the pleader could not have pleaded as he had done unless there had been *mala fides*, rather than to the positive affidavit of the Defendant, who had sworn, before he knew that any objection could be taken to the pleading, that he had not given any bribe. It is quite right that the rules of the Court should be observed, and that a party should be fined for his mistake, but the fine should be measured by the loss to the other side, and not by the importance of the stake between the parties.

Judgment, Bramwell, L.J.

THESIGER, L.J. :—

Thesiger, L.J.

I am also of opinion that it is important that the rules of the Court as to pleading should be enforced, but this may be done at too great a price. The object of these rules is to obtain a correct issue between the parties, and when an error has been made it is not intended that the party making the mistake should be mulcted in the loss of the trial.

As to the substantial point on which the appeal was brought, it is not necessary that I should give any opinion. At the same time, so far as I have heard the arguments, which were not brought to a conclusion, and considering the case of *Thorp* v. *Holdsworth* (1), it appears to me doubtful whether a Defendant can be held to admit what the Plaintiff has not stated, when he has specifically denied all that the Plaintiff has stated.

Solicitors: *R. Charles; Rickards, Walker, & Maude*, agents for *J. Prior, Wolverhampton.*

(1) 3 Ch. D. 637.

C. A.
1878
Nov. 21, 28.

## *Ex parte* M'HATTIE. *In re* WOOD.

*Bill of Sale—Registration—Residence of Grantor—Misdescription—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 3.

A farmer, whose real name was *Joseph Wood*, but who had assumed the name of *Joseph Albert Wood*, and had become known to his creditors by that name, executed a bill of sale in which he was described as "*Joseph Wood*, of *Lache Hall Farm*, in the county of *Chester*, farmer." The same name and description were given in the affidavit filed on the registration of the bill of sale. *Lache Hall Farm* was situate a short distance outside *Chester*, but was really within the county of the city of *Chester*, not in the county of *Chester*. It did not appear that there was any other farm of the same name in the county of *Chester* :—

*Held*, by the Chief Judge and by the Court of Appeal, that the registration was valid.

*Hewer* v. *Cox* (1) followed.

*Murray* v. *Mackenzie* (2) distinguished.

Statement.

*JOSEPH WOOD* was a farmer, and he resided at *Lache Hall Farm*, near *Chester*. The farm was (with the exception of a small portion of it) situate within the limits of the county of the city of *Chester*, and comprised about 300 acres. *Wood*, whose baptismal christian name was "*Joseph*" simply, had assumed the additional name "*Albert*," calling himself *Joseph Albert Wood*. He took the lease of his farm, and transacted his business in that name. The reason he gave for so doing was that a brother of his wife, whose name was also *Joseph*, had come to live in his house, and that he assumed the name of *Albert* to avoid confusion, and was constantly called by that name in his own family.

On the 14th of August, 1876, a deed was executed between *Joseph Wood* (called by that name only), and described as "of *Lache Hall Farm*, in the county of *Chester*, farmer," of the first part, *Lucy Wood*, his wife, of the second part, and *F. T. Hall*, of the third part. This deed contained recitals to the effect that *Lucy Wood* had, out of property settled to her separate use, made from time to time advances to her husband amounting to £1800, upon an agreement that he would on demand give her security for the same, and that she had applied to him to execute a legal

(1) 3 E. & E. 428. (2) Law Rep. 10 C. P. 625.

mortgage to *F. T. Hall* as a trustee for her, for the purpose of securing the £1800 in pursuance of the agreement. And it was witnessed that *Joseph Wood* did thereby assign to *Hall*, his executors, administrators, and assigns, all the crops then growing, or which should at any time thereafter during the continuance of the security be growing, "in or upon a certain farm called *Lache Hall Farm*, situate in the borough of *Chester* in the county of *Chester*, and now in the occupation of the said *Joseph Wood*," and also all his farming, live and dead stock, household furniture, and other effects "upon the said farm, or the mansion known as *Lache Hall Farm* aforesaid," to hold the same to *Hall*, his executors, administrators, and assigns, subject to the proviso for redemption thereinafter contained. This deed was registered as a bill of sale on the 31st of August, 1876. The affidavit of its execution, made by the attesting witness, and filed with a copy of the bill of sale, stated that "I was present and did see *Joseph Wood* and *Lucy Wood* in the said bill of sale mentioned, and whose names are signed thereto, sign and execute the same on the said 14th day of August, and that the said *Joseph Wood* resides at *Lache Hall Farm*, in the county of *Chester*, and is a farmer."

In February, 1878, *Wood* was adjudicated a bankrupt in the *Chester* County Court as "*Joseph Wood*, commonly called *Joseph Albert Wood*, *Chester*, farmer." Upon the application of the trustee the Judge made an order declaring the bill of sale void as against him, mainly on the ground that *Wood* was insufficiently described in the deed and in the affidavit.

Among other evidence in support of the trustee's application, a creditor named *William Garnett* made an affidavit in which he said that he regularly took in *Stubbs' Weekly Gazette*, and that in September, 1876, he observed an entry in it of the 6th of that month, to the effect that on the 14th of August, 1876, a bill of sale had been executed for £1800 by *Joseph Wood* to *Frederic Hall*. In this entry *Wood* was described as of *Lacke Hall*, *Cheshire*, farmer. *Garnett* went on to say: "I did not then or since, until after the commencement of the liquidation proceedings," (instituted by *Wood* on the 30th of November, 1877) "identify the giver of such bill of sale with the above-mentioned *Joseph Albert Wood*, whom I had always known as *Joseph Albert Wood*, and

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residing at *Lache Hall*, in the county of the city of *Chester*." And he said that, after observing the entry, he supplied *Wood* with goods on credit, which he should not have done if he had known or suspected that he was the person referred to in the entry. There was no evidence to shew that there was any other *Lache Hall Farm* in the county of *Chester*.

*Hall* appealed to the Chief Judge. The appeal was heard on the 22nd of July, 1878.

Argument.

*De Gex*, Q.C., and *W. H. Clay*, for the Appellant, referred to *Jones* v. *Harris* (1); *Ex parte Mackenzie* (2); *Foulger* v. *Taylor* (3); *Halkett* v. *Emmott* (4); *Hewer* v. *Cox* (5); *Briggs* v. *Boss* (6).

*Winslow*, Q.C., and *F. Marshall*, for the trustee, referred to *Gardnor* v. *Shaw* (7); *Adams* v. *Graham* (8); *Murray* v. *Mackenzie* (9); *Ex parte Hooman* (10); *Larchin* v. *North Western Deposit Bank* (11).

Judgment, C. J. B.

BACON, C.J.:—

The Appellant claiming under the bill of sale, it is alleged on behalf of the Respondent that the bill of sale is, under the statute, void; for that it, or the affidavit in connection with it, does not contain a statement of the particulars which the statute requires. Now the statute is as plain as can be. The statute requires that there shall be an affidavit made containing "a description of the residence and occupation of the person making or giving the same." That is all I need read; and the first question is, whether that statute has been complied with. I am furnished with an affidavit which is said to be insufficient, not because there is any fault in the jurat or anything of that kind, but because it does not describe the maker of the bill of sale accurately; for that in the bill of sale the name is *Joseph Wood* instead of *Joseph Albert Wood*. But the first observation upon that is that the statute

(1) Law Rep. 7 Q. B. 157.
(2) 42 L. J. (Bkcy.) 25.
(3) 1 L. T. (N.S.) 57.
(4) 47 L. J. (Q.B.) 436.
(5) 3 E. & E. 428.
(6) Law Rep. 3 Q. B. 268.
(7) 24 L. T. (N.S.) 319.
(8) 33 L. J. (Q.B.) 71.
(9) Law Rep. 10 C. P. 625.
(10) Ibid. 10 Eq. 623.
(11) Law Rep. 10 Ex. 64.

does not require that the name should be stated at all. I would not, of course, be understood to say that that would be so where the name does not sufficiently appear in the transaction; but in the Courts of Law, where these questions have been more frequently brought forward than anywhere else, it has been decided that in order to weigh and test the sufficiency of the affidavit, you may look at the bill of sale itself, and if upon reading the bill of sale you find the residence and occupation of the maker properly described, that, according to the strict words of the statute, will be enough. But, besides that, if you look at this affidavit you cannot fail to see what the deponent—that is to say, the witness upon whose statement the registration takes place—means, for he says in effect: "I saw *Joseph Wood*, the party to this bill of sale, execute this bill of sale;" so that the thing, as made, has a certain identity given to it, putting it out of all possibility of question.

Then several cases have been referred to, none of which, in my opinion, touch this case. I am reminded, however, that in one of the cases two of the learned Judges—certainly not the least learned of the Judges before whom these cases have come—expressed the opinion that technicality in these matters has been carried too far, and that the policy of the statute is to be regarded only, and that, if there is no infraction of the statute, enough is done. That has been held by Mr. Justice *Mellor* and Mr. Justice *Lush*, both Judges who are greatly conversant with matters of practice, as well as with matters of law. Then it is said the defect consists in this—that *Joseph Wood* had assumed the name of *Joseph Albert Wood*. I find nothing in the evidence to satisfy me when he assumed the name *Albert*. It may have been, for aught I can tell, as well after the execution of the bill of sale as at any other time. There is an affidavit made by a Mr. *Garnett* upon this subject which is relied on by the Respondent. *Garnett* seems to be a tradesman in the city of *Chester*. But the precise time at which he consulted *Stubbs' Gazette* does not appear, and he says, "I did not then"—whenever that was—"or since, until after the commencement of the liquidation proceedings, identify the giver of such bill of sale with *Joseph Albert Wood*, whom I had always known as *Joseph Albert Wood*, residing at

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*Lache Hall Farm*, in the county of the city of *Chester*," and it is, upon that, suggested that the description in the bill of sale is inaccurate. It is not suggested that the bankrupt made any misrepresentation to anybody, or that if Mr. *Garnett* had found him registered by the name of *Joseph Albert Wood*, he would not have trusted him if he had thought he was this *Joseph Albert Wood*, a farmer of 300 acres, because the particular locality was said to be within the county and not within the county of the city of *Chester*. I think the description "in the county of *Chester*" is a perfectly sufficient and accurate description.

The case of *Hewer* v. *Cox* (1) goes a great deal beyond that, but where there is an accurate description not calculated to mislead, and not having misled anybody, I think I should violate the Act of Parliament, instead of putting it in force, if I were to attend to such suggestions as are made here by Mr. *Garnett*. I consider that nobody looking at *Stubbs' Gazette* could have doubted that the *Joseph Wood* whose execution of this bill of sale has been proved in a proper manner was anybody else than the same *Joseph Albert Wood;* and, in my opinion, the objections which have been taken to the bill of sale altogether fail.

Mr. *Winslow*, who is never at a loss for suggestions and illustrations, for which I am always very much obliged to him, suggests the case of a man changing his name under suspicious circumstances,—of *Smith* changing his name to *Brown;* but if such a change of name took place honestly, in my opinion it would not invalidate a bill of sale. If a man who had been dealing with *Smith* in *London*, found him living at *Chester*, asked to be paid, and got a bill of sale from him, and then it turned out that *Smith*, having fled from his creditors in *London*, had taken the name of *Brown*, could that fact be held to invalidate the creditor's bill of sale? If it were a case of fraud, undoubtedly the Court would act, because the Court never loses the power of unravelling cases of fraud; but in my opinion a bill of sale executed honestly in that way would be as good as if executed in the name of *Smith*, and perhaps better.

I am of opinion that this bill of sale was properly executed and duly registered.

(1) 3 E. & E. 428.

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The order appealed from cannot be sustained; but it was very proper that the matter should be thoroughly inquired into, and the costs both here and below will be ordered to come out of the estate.

From this decision the trustee appealed. The appeal was heard on the 21st and 28th of November, 1878.

Argument.

*Winslow*, Q.C., and *F. Marshall*, for the Appellant:—

The description of the grantor in the bill of sale and in the affidavit is insufficient. He ought to have been described by the name of *Joseph Albert Wood*, by which he was known to his creditors; and the description of the farm as situate in the county of *Chester*, instead of in the county of the city of *Chester*, is entirely erroneous and misleading: *Larchin* v. *North Western Deposit Bank* (1); *Gardnor* v. *Shaw* (2); *Rex* v. *Billingshurst* (3); *Murray* v. *Mackenzie* (4). In *Larchin* v. *North Western Deposit Bank* (5), *Blackburn*, J., said that the object of the Act is "to enable one who is asked to give him (the grantor) credit to know at once, by looking at the register, whether the person he is asked to give credit to has executed a bill of sale." *Jones* v. *Harris* (6) and *Hewer* v. *Cox* (7) do not apply.

*De Gex*, Q.C., and *W. H. Clay*, for the Respondent, were not heard.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

Upon the question whether there is any defect in the registration, after looking at the bill of sale and at the affidavit, I really have no doubt whatever. First of all it is said that there is a distinction between *Joseph Wood*, the name used in the security and in the registration, and *Joseph Albert Wood*, the name by which the grantor was known in the district in which he lived. But the Act says nothing about the name of the grantor, and the truth is that scarcely anybody ever dreams of looking at

(1) Law Rep. 10 Ex. 64.
(2) 24 L. T. (N.S.) 319.
(3) 3 M. & S. 250.
(4) Law Rep. 10 C. P. 625.
(5) Ibid. 10 Ex. 65.
(6) Ibid. 7 Q. B. 157.
(7) 3 E. & E. 428.

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Judgment, C. A. James, L.J.

the christian name of a person for whom he is searching in the register. The thing which a creditor would look for in this case would be the name of *Wood*. There is probably hardly any one in *Chester* or in the county of the city of *Chester* who, knowing Mr. *Wood* of *Lache Hall Farm*, and coming to look at the register for the purpose of inquiring about his circumstances, with reference to his credit, or with the view of lending money to him, would have any hesitation in concluding that Mr. *Wood* of *Lache Hall Farm* was the Mr. *Wood* with whom he had been dealing, or was about to deal. Then, as to the description "*Lache Hall Farm* in the county of *Chester*," *Lache Hall Farm* is a very distinctive and peculiar designation. *Lache Hall Farm* is really in the county of the city of *Chester*, but probably very few people know the distinction between the county and the county of the city. If the question was asked, Where is *Lache Hall Farm?* the answer would be, in the county of *Chester*. Probably very few people are aware that the county of the city extends beyond the city walls and includes an enclave in the county of *Chester*. I think this is sufficient to shew that there has not been such an inaccuracy in using the words "the county of *Chester*" instead of "the county of the city of *Chester*" as was calculated to mislead any one, or as did in fact mislead any one. One creditor, named *Garnett*, does indeed say that he was misled by an entry which he saw in *Stubbs' Weekly Gazette*. But there the description of the grantor's residence was different from that in the register. It was given as "*Lacke Hall Farm*," and of course the person making or the person accepting the bill of sale could not be in any way affected by that error. The grantor's place of residence is, I think, in substance accurately described in the register.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion. The first point raised is this, that though the bill of sale was executed by the grantor in his proper name of *Joseph Wood*, he was at the time carrying on his farming business, and was generally known as *Joseph Albert Wood*. But the *Bills of Sale Act* does not require that the name of the grantor should be given otherwise than by giving his real name. It is quite possible that, if a man was carrying on business in a name different

from his real name, that might be an element of fraud to be taken into consideration quite independently of the requirements of the *Bills of Sale Act.* Then, as to the second point, the Act requires that a description of the residence and occupation of the person giving the bill of sale shall be registered. I think that two of the cases which have been referred to on behalf of the Appellant very well illustrate what is meant by a description of the residence and occupation. In *Murray* v. *Mackenzie* (1) Mr. Justice *Lindley*, following the other three Judges in giving his decision, states concisely the same principle as had been enunciated by them at greater length, when he says, "The statute is imperative. If the bill of sale is filed without a substantially strict compliance with its requirements, it is to be null and void." In *Jones* v. *Harris* (2) Lord Chief Justice *Cockburn* says: "The Act does not specify to what extent of particularity the description of the residence must be carried. We have, therefore, to put a construction upon the meaning of the word 'residence,' and I think that what is meant and intended thereby is a reasonably sufficient description of a residence, which would guide the inquiries of a person who may be interested in knowing whether the individual about whom he desires to inquire, and to whom he is about either to advance money or to supply goods on credit, or whom he proposes to otherwise trust, has made any disposition of property by way of a bill of sale. In fact, to enable the party to make such investigations as would be necessary for his protection before he either advanced money or supplied goods on credit."

In *Jones* v. *Harris* the Court of Queen's Bench considered that the deficiency of the description in the affidavit might be supplied by a reference to the bill of sale. The affidavit had simply described the giver of the bill of sale as residing at *Dynevor Lodge*, but the bill of sale described him as of *Dynevor Lodge*, in the parish of *Llanarthney*, in the county of *Carmarthen*. The deficiency of the description in the affidavit was allowed to be supplied by the fuller description in the bill of sale. In *Murray* v. *Mackenzie* the state of things was very different. There there were, I think, two positive misdescriptions, the fact being this,

(1) Law Rep. 10 C. P. 625, 629. (2) Law Rep. 7 Q. B. 157, 160.

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that whereas the debtor resided at No. 37, *Malpas Road*, he was described in the affidavit as residing at No. 73, *Malpas Road*, and that whereas the attesting witness was described in the attestation to the bill of sale as of No. 2, *South Terrace, Hatcham Park*, his actual residence was at No. 3. This might very possibly mislead any person who was inquiring into the circumstances under which the bill of sale was given. In the present case I think we have one very similar to *Hewer* v. *Cox* (1), where the makers of the bill of sale were described in it and in the affidavit as residing at *New Street, Blackfriars*, in the county of *Middlesex*. They did carry on business in *New Street, Blackfriars*, which, though it is within the county of *Middlesex*, is properly described as in the city of *London*. That was held not to be a misdescription. Here a man is described as living at *Lache Hall Farm*, not as in the county of the city of *Chester*, which would have been strictly accurate, but as in the county of *Chester*. Was that likely to mislead a person making inquiry to satisfy himself whether he should trust this man or not? I think not, but that there has been what Mr. Justice *Lindley* called a substantially strict compliance with the requirements of the Act.

Judgment, C. A. Baggallay, L.J.

Thesiger, L.J.

THESIGER, L.J.:—

I concur with what has fallen from the other members of the Court. There is nothing in the Act which necessitates the name of the grantor being correctly given, that is, in regard to the validity of the registration. Sect. 1, which speaks of what is to be included in the affidavit which is to accompany the filing of the bill of sale, does not mention the name of the grantor at all. And, although it is true that in sect. 3, "the name, addition, and description of the person making or giving" the bill of sale are included in that which is to be entered by the officer of the Court, that section does not relate to the matters which are to validate or invalidate the bill of sale, but relates solely to the duties of the officer of the department in which the bill of sale is to be filed, and constitutes only a direction to him as to the entries which are to be made.

Well then, that being so, the whole question resolves itself into

(1) 3 E. & E. 428.

this, whether there has been a sufficient description of the residence of the person making the bill of sale. In *Hewer* v. *Cox* (1), to which reference has been made, Mr. Justice *Wightman* says (2): "The object of the Legislature was to afford creditors facilities for discovering whether any of the persons with whom they deal has made a bill of sale; and, in order to effect this object, it requires such a description of the residence and occupation of the person making or giving such a bill to be filed as shall enable that person's creditors to identify him and take precautions accordingly." It does not require that the description of the residence shall be absolutely accurate, but it does require that there shall be such a description as will enable possible future creditors to identify the maker of the bill of sale. Now, in *Hewer* v. *Cox*, as has been pointed out by Lord Justice *Baggallay*, the circumstances were very similar to those of the present case. There was a proper description of the residence, there was an improper description of the county in which that residence was situated; and it seems to me that, the Court having there decided that that was not sufficient to invalidate the bill of sale, the present case is an *à fortiori* one, and for this reason, that in a popular sense *Lache Hall Farm* may be said to be in the county of *Chester*. It is true that, owing to the old boundaries between the county of the city and the county proper, a residence, which is situate two miles outside the walls of *Chester*, is strictly and legally speaking within the county of the city and not within the county of *Chester* proper. But, popularly speaking, I venture to think that, for one person who would know that *Lache Hall Farm* was within the county of the city of *Chester*, there would be ten who would suppose that it was within the county of *Chester*. Under these circumstances *Hewer* v. *Cox* seems to be in point, and though the debtor made an addition to his christian name when he came to *Lache Hall Farm*, that does not seem to me to be sufficient to mislead the creditors. I think that as he was described as *Joseph Wood*, which was his real name, and his residence was described by a name which does not appear to belong to any other place in the county, all creditors or intending creditors had a sufficient identification of the man and of his residence to enable them to see whether the person they

(1) 3 E. & E. 428. (2) 3 E. & E. 433.

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were going to trust had received advances on the security of a bill of sale.

Appeal dismissed with costs.

Solicitors for Appellant: *Chester & Co.*, agents for *Walker & Smith, Chester.*

Solicitors for Respondent: *Denton, Hall, & Barker.*

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C. J. B. *Aug.* 3.

C. A. *Nov.* 28; *Dec.* 5.

## *Ex parte* NATIONAL GUARDIAN ASSURANCE COMPANY. *In re* FRANCIS.

*Bill of Sale—Construction—Power to Grantor to take Possession on happening of any one of certain Events—Subsequent Proviso that Grantor shall retain Possession until Default in Payment—Reputed Ownership—Order and Disposition—Friendly Possession—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.

A bill of sale of chattels empowered the grantee to take possession in case (*inter alia*) the grantor should become embarrassed in his affairs, or in case any action at law should be commenced against him. There was a subsequent proviso that, until default should be made in payment, according to the covenant and proviso therein contained, it should be lawful for the grantor to retain possession:—

*Held*, by the Court of Appeal (reversing the decision of *Bacon*, C.J.), that the prior clause was not controlled by the subsequent proviso, but that on the happening of one of the specified events, the grantee was entitled to take possession, though no default in payment had been made by the grantor.

In order to exclude the operation of the reputed ownership clause, a real possession, even though it be friendly, is sufficient.

But, to satisfy the *Bills of Sale Act*, the possession must be apparent as well as real.

Statement.

*G. D. FRANCIS* was the lessee of the *Theatre Royal, Newcastle-on-Tyne*, and of the *Theatre Royal, Glasgow*. He resided at *Newcastle*. On the 20th of August, 1877, he, in consideration of an advance of £600, executed a bill of sale of his goods and chattels in his dwelling-house to the *National Guardian Assurance Company*, to secure the payment to them of £680 in three equal instalments, on the 16th of January, the 16th of April, and the 16th of July, 1878. The deed contained a covenant by the

borrower to pay the instalments on the days appointed, and that, in case default should be made in payment of either of them on the days appointed, the whole of the remaining instalments should become payable immediately. And the borrower thereby assigned the goods, and all his right and property therein, to the company "as their own proper chattels and effects." Provided nevertheless that, in case the borrower should pay to the company the £680 by the instalments and according to the covenant thereinbefore contained, and should observe and perform all other his covenants and agreements therein contained, then the deed should cease and determine. And the borrower did thereby declare that "after default shall be made in payment according to the covenant hereinbefore contained, or on breach of any covenant of the borrower herein contained, and after written demand for payment shall have been given to or left for him at his last known place of business or abode, sealed by the company, or signed by any person on their behalf, or in case he shall die or be or become bankrupt, or compound or attempt to compound with his creditors, or become embarrassed in his affairs, or in case any action at law, or any other legal process shall be commenced against the borrower, or in case any distress or writ of execution shall be issued or levied, or attempted to be levied, upon the said effects or any part thereof . . . . then and on either of the said cases happening" it should be lawful for the company to take possession of the goods and to sell them, and out of the proceeds of sale to retain their costs and what should be due to them, and to deliver the surplus (if any) to the borrower. And there was a further proviso that "until default be made in payment according to the covenant and proviso herein contained, it shall be lawful for the borrower to hold, make use of, and possess the said goods, chattels, and effects," without any hindrance or disturbance by the company. The bill of sale was duly registered. The first instalment of the £680 was paid when it became due. On the 26th of February, 1878, Mr. *Bourne*, the manager of the company, having received information that *Francis* was in embarrassed circumstances, instructed an auctioneer at *Newcastle* to take possession of the goods, and on the 5th of March a man was put in possession. No demand for payment was made before possession was taken. At this time several

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Statement.

actions had been commenced against *Francis*, and an execution had been levied on his goods in the theatre at *Newcastle*. On the 7th of March he filed a liquidation petition in the County Court at *Newcastle*. The goods were afterwards sold, and the trustee in the liquidation claimed the proceeds of sale. *Francis* deposed that at the time when the company took possession he was not embarrassed in his circumstances, and that, had any demand been made upon him, and a reasonable time allowed, he could without any difficulty have made arrangements to pay any sum that might have been demanded by the company in respect of any claim by them against him. And, with regard to the nature of the possession taken, *Francis* deposed that it consisted in a man being left in the house, who remained in the back premises, *Francis* and his family continuing to occupy the house and use the furniture in the same way as they had previously done without any interruption. *Charles Brough*, the man who was put in possession, deposed, "The possession, I considered, was a friendly one, Mr. *Francis* and his family being allowed to continue using the furniture as before." And in a letter written on the 2nd of March by a Mr. *Egerton*, who was acting on behalf of *Francis*, to Mr. *Bourne*, he said, "I think in Mr. *Francis'* own interest you should not delay being in possession." And Mr. *Bourne* deposed that "Mr. *Francis* concurred in our taking possession." The Judge of the County Court held that the trustee was entitled to the money, on the ground that the bill of sale did not authorize the taking of possession unless a written demand for payment was first made by the company. The company appealed to the Chief Judge. The appeal was heard on the 3rd of August, 1878.

*E. C. Willis*, for the Appellant.

*Winslow*, Q.C., and *Creed*, for the trustee.

Judgment, C. J. B.

BACON, C.J.:—

The bill of sale contemplates a variety of events in which it may be the right of the bill of sale holders to take possession. They lent a sum of money payable by instalments, and it provides that, if default shall be made in payment after demand, there shall

be a right to enter; and it gives them a right to take possession in certain other cases. Now, that there was no demand made before possession was taken is a fact about which there is no question. There was no demand made, and, indeed, no money was due. The only question is as to the lawfulness of the possession, and whether any of the other events which entitled them to take possession had happened. Mr. *Bourne's* evidence is to the effect that from information which reached him, no matter from what source or at what time, he bethought himself that his security was in danger, and he went down to the place where the property was, and there employed an auctioneer to take possession. Unless there was default made in payment, unless the instrument authorized him to take possession, he had no right to do so, because the stipulation is that the borrower shall be in undisturbed possession unless he makes default in payment. The deed also provides that the company may enter in case he becomes bankrupt, or upon the happening of other events. But where is the evidence that any of these things had happened? It is said that the debtor was in a state of embarrassment, but that is a very wide expression. Is a man necessarily embarrassed because actions are brought against him? Those actions may or may not have been rightly brought. I will assume that they were rightly brought, and that he had not the money in his pocket at that time. But that is not being in embarrassed circumstances, because he might have elsewhere a sum quite sufficient to cover the amount for which the actions were brought. But that is the only account that we have heard of his embarrassments—that somebody had heard that there were four actions brought against him. That may have been quite true, but I cannot turn a deaf ear to the evidence—which is uncontradicted—of *Francis* himself, that he was perfectly able to pay all his debts. He had these actions brought against him, but they did not embarrass him, because he had assets of various kinds, by means of which he could pay his debts. There are many people who neglect to pay their debts, but that does not necessarily imply that they are in embarrassed circumstances. The deed gives no authority to take possession of the goods of a man who, having borrowed £680, had repaid the first instalment, and who would probably have repaid the second but

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for the conduct of the somewhat officious manager of the bank, who goes down and of his own free will takes possession. And then how does he take possession? He puts a man in friendly possession; the debtor is not turned out of his house; no one exercises any authority over the goods, and the man and his wife and children remain in the house; but there is a blind possession, a friendly formal possession on behalf of the company. I cannot say that the possession was lawful; it was not justified by the bill of sale, or by any of the circumstances. Nor was it a sufficient possession, which could deprive the trustee of his title to the goods. I think that the order of the County Court was right.

C. A.

From this decision the company appealed. The appeal was heard on the 28th of November and the 5th of December, 1878.

Argument.

*De Gex*, Q.C., and *E. C. Willis*, for the Appellants:—

The taking possession was justified by the terms of the deed. The evidence shews that actions had been commenced against *Francis* before possession was taken. The possession taken was sufficient to satisfy the reputed ownership clause; for that purpose *de facto* possession is enough, for it puts an end to the consent of the true owner of the goods. Even an unsuccessful attempt to obtain possession would do. It is not necessary that the possession should be apparent, as under the *Bills of Sale Act*.

*Winslow*, Q.C., and *Creed*, for the trustee:—

According to the true construction of the bill of sale the right to take possession did not arise until default had been made in payment of one of the instalments. Nothing was due on the 5th of March. Even when mortgage money is made payable on demand it has been held in many cases that a reasonable time must be given to the mortgagor to find the money. The possession taken was a merely friendly or colourable possession, which is not sufficient: *Jackson* v. *Irvin* (1); *Vicarino* v. *Hollingsworth* (2). The invitation was to take possession in the interest of *Francis*; such a transaction cannot be supported: *Ex parte Arnold* (3).

(1) 2 Camp. 48.

(2) 20 L. T. (N.S.) 362.

(3) 3 Ch. D. 70.

JAMES, L.J. :—

The question depends entirely on the construction of the deed, and I find it impossible to arrive at the same conclusion as the Chief Judge. He appears to have assumed that the proviso at the end overrides the previous clause, and that therefore the possession taken by the Appellants was unlawful. I think the real effect of the deed, taking it altogether, is this: The mortgagees became the legal owners of the goods, and as such would have the right to take possession of them. Then there is a proviso in the usual form that the mortgagor shall be entitled to retain possession until default be made by him in payment according to the covenant and proviso contained in the deed. That is to say, the mortgagor had a kind of term in the goods granted to him by way of a charge upon the absolute ownership of the mortgagees. But in the same deed there is an express provision enabling the mortgagees, on the happening of a number of different contingencies, to take possession of the goods and to sell them. It is impossible to conceive that this express provision was intended to be entirely abrogated by the subsequent authority to the borrower to hold possession except in one contingency. There is no magic in the position of the clauses in the deed; every clause is part and parcel of the bargain between the parties. Did, then, any of the things happen which entitled the mortgagees to take possession? There can be no doubt that one of them did. The borrower was "embarrassed in his affairs;" there could not be better evidence of that than the fact that an execution had been levied in his theatre, which was his principal means of getting his living. The manager of the company was informed that he was embarrassed, and the information on which he acted turns out to have been true. He was justified, therefore, in taking possession. It is said, however, that the possession taken was not a hostile but a friendly possession. That is often the case. Under the *Bills of Sale Act* the possession must not be colourable, but under the reputed ownership clause it is quite a different matter. The only question is whether possession was taken by the true owner of the goods with the intention of asserting his rights. In the present case, whatever were the motives of kindness of the company's manager towards the debtor, it is clear

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that his object was to get the goods out of the debtor's order and disposition, so as to avoid the effect of his bankruptcy, which was then imminent. He had heard that the debtor was embarrassed, and he completed his title by taking absolute possession of the goods. It was not a sham but a real possession, taken for the purpose of giving effect to the security of the company. The order of the Chief Judge must be reversed.

Judgment, C. A. Baggallay, L.J.,

BAGGALLAY, L.J.:—

The case of the Respondent is based on two grounds. It is said, first, that there was no right to take possession at all; and, secondly, that the possession was a friendly one. No doubt the right to take possession must be exercised according to the terms of the deed. But here we have the circumstance, not only that actions at law had been commenced against *Francis*, but that the fact of these actions having been commenced gave the right to the company to take possession; and this apart from any question of embarrassment. The proviso at the end of the deed must be read in connection with the rest of the deed, and not so as to make three-fourths of the previous provisions ineffectual. The question of the nature of the possession seems hardly to have been fully considered by the Chief Judge. I entirely concur with the Lord Justice, and I can see no ground for saying that the possession was not such as is ordinarily taken by a bill of sale holder in the exercise of his rights.

Thesiger, L.J.

THESIGER, L.J.:—

I am of the same opinion. When the whole of the bill of sale is looked at there can be no reasonable doubt as to its meaning. There is a distinct provision that, in the event of the debtor becoming embarrassed, or of actions being commenced against him, the mortgagees shall be entitled to take possession. It is said that this is subject to the condition that there must have been a previous written demand for payment. But it is clear that that condition only refers to the previous words, "default in payment according to the covenant hereinbefore contained, or on breach of any covenant of the borrower herein contained." Then it is said that the power to take possession is controlled by the subsequent

proviso that the debtor shall be left in possession until default shall be made in payment. It would, I think, be running counter to all rules of construction to hold that this general proviso is to override the prior special one. On the construction of the deed I have no doubt that the power to take possession arose on the debtor's becoming embarrassed in his circumstances, or on the happening of any of the other events mentioned. Then it is said that a sufficient possession was not taken, and that we ought to look at the motives which actuated the company's manager. I agree that we may do this, not for the purpose of altering the character of the possession taken, but in order to arrive at the conclusion whether the possession was a real one or a mere sham. But, as soon as we arrive at the conclusion that the possession was real, the motives with which it was taken are immaterial. Here there is abundant evidence of a real possession. The debtor had, as in *Vicarino* v. *Hollingsworth* (1), the use of the goods, but it was subject to the control of the man who was put into possession, and who was there to see that the use was in accordance with the rights of the bill of sale holders. If we were to hold that this was not a sufficient possession, we should be confusing the possession which is necessary with reference to the question of order and disposition with that which is required under the *Bills of Sale Act*, and which must be apparent as well as real.

Solicitor for Appellants: *A. D. Michael.*

Solicitor for Trustee: *G. B. Wheeler*, agent for *D. E. Stanford, Newcastle-on-Tyne.*

(1) 20 L. T. (N.S.) 362.

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## WADDELL *v.* BLOCKEY.

[1877 W. 356.]

*Practice—Appeal—Security for Costs—Pauper—Special Circumstances—Abandoned Motion—Motion for New Trial—Rules of Court*, 1875, *Order* XL., *r.* 10

A Defendant in an action which had been tried by a Judge without a jury gave notice of appeal against the judgment, and also obtained *ex parte* a rule *nisi* for a new trial. He did not set down the appeal for hearing, but, before the argument of the rule for a new trial, gave fresh notice of appeal from the judgment. There was a substantial question to be tried as to the measure of damages. The Appellant being in insolvent circumstances, the Plaintiff moved for security for costs:—

*Held*, first, that the Plaintiff was entitled to the costs of the first notice of appeal as an abandoned motion:

Secondly, that the second notice of appeal was unnecessary, inasmuch as the whole question could be tried under Rules of Court, 1875, Order XL., rule 10, upon the application to make the rule for a new trial absolute; and the Appellant was therefore ordered to give security for costs.

Statement.

THE action in this case was commenced in the Chancery Division by the trustee in the liquidation of *P. Lutscher*, to recover £43,547 damages for loss sustained in respect of certain purchases of Indian 5½ per Cent. Rupee Paper made by the Defendant. The action was ordered to be tried before a jury, and the trial came on before Baron *Huddleston*, in *Middlesex*, in August, 1878. After the first day's trial the jury, not being able to agree, were discharged, and the trial was adjourned to be taken before Baron *Huddleston*, sitting without a jury; who ultimately, on the 7th of August, 1878, gave a verdict and judgment for the Plaintiff for the full amount claimed and costs.

On the 22nd of August the Plaintiff obtained a debtor's summons against the Defendant on the amount recovered in the action. The Defendant, being dissatisfied both with the finding of the facts and the measure of damages adopted by the Judge, gave formal notice of motion on the 19th of September, that the judgment of Baron *Huddleston* might be set aside and a new trial had on the grounds therein stated; or that judgment might be entered for the Defendant; or that such other order might be made as the Court of Appeal might direct.

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The Defendant did not set down this motion for hearing, but on the strength of the notice having been given he obtained an order in Bankruptcy staying the proceedings on the debtor's summons.

On the 7th of November the Defendant obtained *ex parte* a rule *nisi* for a new trial on the ground of excessive damages; and on the 5th of December he gave another notice of motion that the judgment might be set aside, and judgment entered for the Defendant, or that the same might be varied.

Statement.

The Plaintiff then gave notice of motion to dismiss the appeal of the 19th of September for want of prosecution; and to discharge the notice of appeal of the 5th of December as irregular; or, in the alternative, that the Defendant might be ordered to give security for costs of that appeal.

In support of the application the Plaintiff referred to an affidavit filed by the Defendant in opposition to the debtor's summons, in which he said: "I have no means whatever wherewith to pay the moneys recovered in this action, or any part thereof. Since the month of July, 1877, I have been living, and am now living, entirely upon the charity of my friends."

*Warmington*, in support of the motion:—

Argument.

The notice of appeal has never been withdrawn, and the appeal is still pending; therefore the proper course is to ask to discharge it for want of prosecution. For the same reason the second notice of appeal is irregular, for it was given while the first appeal was pending. I therefore ask that it should be discharged for irregularity. If I am not entitled to dismiss the first appeal for want of prosecution, I am entitled to the costs of it, as an abandoned motion: *In re National Funds Assurance Company* (1). If the Court should be of opinion that the second appeal is regular, I ask for security for costs. The Defendant has admitted that he is a pauper, and his conduct has been vexatious and embarrassing: *Hankin* v. *Turner* (2); *Usil* v. *Brearley* (3).

*C. H. Anderson*, for the Defendant:—

The first notice was intended as a notice of the application for a

(1) 4 Ch. D. 305. (2) *Ante*, p. 372.
(3) 3 C. P. D. 206.

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Argument.

new trial. At all events, it has now entirely gone, and the second notice was regular. The fact of the Appellant being a pauper is no reason for obliging him to give security for costs, without other special circumstances, of which there are none here. There is a substantial question to be tried, namely, the measure of damages, and in such a case the Court will not order security to be given: *Rourke* v. *White Moss Colliery Company* (1). The second notice was given in order to raise the question whether the Defendant was not entitled to judgment notwithstanding the verdict, so as to meet the contingency of the Court of Appeal refusing either to disturb the verdict or to order a new trial.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

The first point for decision is what is to happen when a party gives notice of appeal and does not bring the appeal to a hearing. Ought his opponent to move to dismiss the appeal for want of prosecution, or is he entitled simply to ask for the costs of the motion as of an abandoned motion? In the present case the Defendant's proper course if he wished to have a new trial was to obtain *ex parte* a rule *nisi* for a new trial under Rules of Court, 1875, Order XXXIX., rule 1. Instead of that he gave formal notice of motion that the judgment might be set aside and a new trial had, or that the judgment might be entered for the Defendant. That notice involved an application for a new trial, but it involved something more, for it asked that the judgment might be entered for the Defendant. It was such a notice that if the motion had been brought on the Plaintiff must have appeared or he would have been liable to have the judgment set aside behind his back. But the Defendant did not set it down for hearing; there was therefore no motion, and the Plaintiff could not move to dismiss the appeal for want of prosecution, but he was entitled to treat it as an abandoned motion, and to ask for the costs of it as such. That must, therefore, be the order as to that notice of motion.

As to the other point, namely, the application for security for costs, the case stands thus. The Defendant applied for and obtained a rule *nisi* for a new trial; but now he gives notice of another appeal, asking that the judgment may be entered for him.

(1) 1 C. P. D. 556.

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By his own shewing he is unable to pay costs, and the question for the Court is whether a pauper is entitled to take such a proceeding as this without giving security for costs. The appeal in itself is not frivolous, for there is a serious question for argument. That being so, was this second motion necessary? for a pauper is not entitled to indulge in the luxury of a mere precautionary proceeding. It is quite plain that the substantial question is whether £43,000 or nothing at all is due from the Defendant. That question could be considered and decided on the application for a new trial; and if the Court were to decide in the Defendant's favour, and were satisfied that it had all the materials before it, and thought no new trial necessary, it could at once give judgment for the Defendant under rule 10 of Order XL. So that it is impossible to contend that this second appeal is necessary for deciding the important question in the action. Then for what object was it given? It is suggested that if the application for a new trial were entirely refused and the judgment not set aside on that application, the Defendant would then have the benefit of the present appeal. But in that case there would be ample time to give notice of appeal. I think, therefore, that this appeal was not necessary, and that if the Defendant wishes it heard he must give security for costs. But as the costs will not be much increased by it, £20 will be a sufficient sum to deposit. The Plaintiff's costs of this application will be costs in the action; the Defendant will have no costs.

Baggallay and Thesiger, L.JJ.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors: *A. G. Ditton; Flux & Co.*

C. A.
1878
Dec. 6, 16.

## KREHL *v.* BURRELL.

[1876 K. 30.]

*Appeal from Finding of Fact—Interlocutory Order—Time for appealing—Order* XXXIX. *r.* 1*a.*

An action for an injunction to restrain the Defendant from building so as to interfere with a right of way claimed by the Plaintiff, which right was disputed, came on for trial before the Master of the Rolls, with witnesses, no issues of fact having been directed. After the examination had been concluded, the Master of the Rolls stated that he found a verdict for the Plaintiff as to the right of way, and directed the action to stand over in order to give the parties an opportunity of coming to an arrangement. Upon the action coming on again, a mandatory injunction was granted; the order reciting that the Court had found the Plaintiff entitled to the right of way. The Defendant, after the expiration of twenty-one days from the time when the verdict had been given, appealed from the order:—

*Held*, that the finding that the Plaintiff was entitled to the right of way could not now be questioned, for that the Defendant ought to have moved the Court of Appeal for a new trial within twenty-one days from the verdict being given.

Order XXXIX., rule 1a of the Rules of Court, 1875, does not apply to trials before a Judge of the Chancery Division, but where a Judge of that Division has definitely found a verdict on a matter of fact, such verdict is equivalent to an interlocutory order, which can only be appealed from within twenty-one days.

Statement

THIS was an appeal by the Defendant from a decision of the Master of the Rolls (1).

The action was to restrain the Defendant from erecting buildings interfering with the Plaintiff's right of way over *Windmill Court*. The Defendant disputed the existence of the right of way, and, after the commencement of the action, proceeded with and completed a building obstructing the way.

No issue of fact had been directed, but, as appears from the report (1), the action came on for trial with witnesses. After hearing the evidence, the Master of the Rolls, on the 6th of December, 1877, said, "I give a verdict for the Plaintiff, and reserve my judgment for a fortnight." This postponement was in order to give the Defendant an opportunity of offering terms to

(1) 7 Ch. D. 551.

the Plaintiff. No arrangement having been come to, the case was in the paper to be disposed of on the 28th of January, 1878, when the following order was made:—

Statement.

"This action coming on for trial the 4th and 6th December, 1877, and this day, before the Court in the presence of counsel for the Plaintiff and the Defendant, and upon hearing the pleadings, the answer of the Defendant to the interrogatories filed for his examination by the Plaintiff, and the answer of the Plaintiff to the interrogatories filed for his examination by the Defendant read, and upon hearing the evidence of, &c., as taken upon their respective oral examination before this Court at the trial of this action, this Court did find that the Plaintiff was and is entitled to such right of way and other rights over *Windmill Court* as claimed in this action by the Plaintiff, and that the same had been obstructed by the Defendant and the building erected by him; and, counsel for the Plaintiff moving for judgment in accordance with such finding, this Court, &c." The order went on to grant an injunction against erections obstructing the Plaintiff's right of way, and a mandatory order directing the Defendant to take down the buildings he had erected.

The Defendant, on the 2nd of April, appealed from this order, asking by his notice that the verdict might be set aside and the order discharged.

Dec. 6. On the appeal being opened as an appeal involving not only the question whether a mandatory injunction ought to have been granted or not, but also the question whether the Plaintiff had a right of way, the preliminary objection was taken that the verdict was conclusive on the matter of fact, no steps having been taken to set it aside within twenty-one days.

Argument.

Sir *J. Holker*, A.G., *Chitty*, Q.C., and *Hemings*, for the Appellant.

[JAMES, L.J.:—Ought you not to have moved for a new trial: *Fernie* v. *Young* (1)?]

That is not the course of proceeding in the Chancery Division. The original Order XXXIX., rule 1, was altered by Order XXXIX.,

(1) Law Rep. 1 H. L. 63.

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rule 1a, which provides that where a trial has been by a Judge without a jury, the application for a new trial shall be to the Court of Appeal: *Oastler* v. *Henderson* (1). The appeal to the Court of Appeal is on the facts as well as the law: *Sugden* v. *Lord St. Leonards* (2).

[THESIGER, L.J., referred to *McAndrew* v. *Barker* (3).]

That was the case of an interlocutory proceeding, as was *Cummins* v. *Herron* (4). Here there was no interlocutory proceeding. There was no inquiry; no issue had been directed; there was nothing but the trial of the action. In the Chancery Division a verdict is unknown except where issues have been directed. We say, then, that in substance there was nothing but a judgment on the law and facts together according to the old course in Chancery, and that it was not competent to the Master of the Rolls to split the trial in this way and introduce the consequences of there having been an interlocutory proceeding when there had not in fact been any; no order was drawn up, and judgment would have been given at the time if an arrangement had not been suggested. An order made at the trial cannot be an interlocutory order. Suppose we had appealed from the verdict, what could the Court of Appeal have done? Would it have directed a new trial? Such a thing in the Chancery Division would be quite without precedent. Suppose the order had declared the Plaintiff entitled to a right of way, would that not have been open to appeal for a year? The case is like *Sugden* v. *Lord St. Leonards*, where the whole case was considered open as under the old Chancery Practice.

[JAMES, L.J.:—Here the Judge says there is a definite question of fact, and he gives a verdict upon it. Why is the question of fact to be kept open longer than if it had been tried at the assizes?

BAGGALLAY, L.J.:—This appears to be a *casus omissus* in Order XXXIX., rule 1, and the question is whether it does not come under Order LVIII., rule 15.]

(1) 2 Q. B. D. 575.
(2) 1 P. D. 154.
(3) 7 Ch. D. 701.
(4) 4 Ch. D. 787.

The rules provide that in all cases not provided for by them the old practice is to continue, and this mode of splitting a trial ought not to be introduced unless the rules provide for it. When issues are tried before a jury an elaborate and expensive machinery is called into play, and reasons exist for restricting the right to a new trial which do not apply to a case like the present.

*Davey*, Q.C., and *Everitt*, for the Plaintiff:—

It is not disputed that the Master of the Rolls, when he proceeded in this way, was understood to intend to limit the time for appealing; so there is no surprise. Order XXXVI., rule 22, applies to all the Divisions, and gives the Judge authority to do what he did here. The only judgment given on the 28th of January was the mandatory injunction. The verdict on the 6th of December was an interlocutory step equivalent to an order. The course that ought to have been taken was to move for a new trial within twenty-one days, and that appeal could have been heard together with an appeal from the final judgment. The only other alternative is that the time is limited by Order XXXIX., rule 1a, if that rule is not confined to the Queen's Bench, Common Pleas, and Exchequer Divisions. It may often be a very expedient course for a Judge, under Order XXXVI., rule 22, to suspend his judgment on the law until it is seen whether his finding on the matter of fact will be called in question.

[BAGGALLAY, L.J.:—If the finding had been appealed from, how could the rule requiring the Appellant to produce an office copy of the order have been complied with?]

The Registrar, if applied to, would have drawn up an order on the verdict. Nothing was drawn up because it was not asked for.

JAMES, L.J.:—

I think we must take time to consider this preliminary point. I am not sure that we may not ask some of the other Judges to assist us, because the construction of the rule is a very important point. The Master of the Rolls, beyond all question, entertained

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the view that the verdict was a thing to be dealt with on motion for a new trial, and not otherwise.

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Judgment.

Dec. 16. The judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.) was now delivered by

THESIGER, L.J.:—

4 C.P.D. 290

This is an appeal, brought on the 2nd of April last, against an order of the Master of the Rolls, made on the previous 28th of January, the material parts of which are as follows:—"This action coming on for trial on the 4th and 6th of December, 1877, and this day (the 28th of January, 1878), before the Court in the presence of counsel for the Plaintiff and the Defendant, and upon hearing the pleadings, &c., and upon hearing the evidence of the witnesses (naming them) taken upon their respective oral examinations before this Court at the trial of the action, this Court did find that the Plaintiff was and is entitled to such right of way as claimed in this action, and that the same had been obstructed by the Defendant, and, counsel for the Plaintiff moving for judgment in accordance with such finding," the Court ordered that a perpetual injunction should be granted to restrain the Defendant from obstructing the right of way. Upon the appeal coming on before us it was objected on the part of the Respondent that, so far as the appeal attempted to impugn the verdict or finding of the Master of the Rolls upon the question of fact, it was out of time, not having been brought within twenty-one days from the 6th of December, 1877, on which day it was alleged his verdict or finding was given. As the objection raised an important question of practice in reference to proceedings in the Chancery Division of the High Court, and one upon which the rules under the Judicature Acts are not explicit, we took time to consider it, intimating at the same time that, if we thought it necessary, we would consult other members of the Court of Appeal, and possibly have the matter reargued before a fuller Court. Having, however, since the argument had an opportunity of verifying what took place in the Court below, by reference to the Registrar's

book, and of considering the matter in the light of the information thereby obtained, we have come to the conclusion that it presents no real difficulty and requires no further consultation or argument.

One great object of the Judicature Acts and Rules was to assimilate so far as was possible, looking to the different subject-matters with which they had to deal, the practice and procedure of the various Courts which now constitute separate Divisions of the High Court of Justice, and it is the duty of this Court, in deciding any particular question of practice or procedure, to bear that object in mind, and to put a construction upon the Acts and Rules, as far as they will admit of it, so as to effect it. Now the practice of the Common Law Divisions in the matter of applications for new trials or appeals upon questions of fact is pretty clearly defined by the Rules. An action commenced in any of these Divisions may, speaking generally, be tried in one of two ways, viz., either by a Judge with a jury or by a Judge alone. If tried by a Judge with a jury, the findings of the jury can, by virtue of Order XXXIX., rule 1, only be questioned in the first instance by an application for a new trial made to a Divisional Court within the times mentioned in rule 1a of the same Order, and the order made by the Divisional Court upon such application is an interlocutory one, the appeal against which must be brought by motion to the Court of Appeal within twenty-one days. If the case is tried by a Judge without a jury, then, by virtue of the same rule 1, the application by way of appeal from his finding upon questions of fact must be to the Court of Appeal, whatever be the particular ground of objection: *Oastler* v. *Henderson* (1), and every such appeal must properly take the form of an application for a new trial, although if, upon the argument, the Court of Appeal is satisfied that the finding impugned was wrong, and is satisfied also that it has before it all the materials necessary for determining the questions in dispute, it will give judgment accordingly, instead of directing a new trial: Order XL., r. 10. The course adopted by the Court upon such applications for a new trial, where there is also an appeal against the judgment of the Judge upon matters of law, will probably be in many, if not in most cases, as it has already been in some, to order the application to be brought on

(1) 2 Q. B. D. 575.

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with the appeal, so as to have the facts and the law argued together, practically like one appeal; but, however that may be, the findings of the Judge on matters of fact, and his judgment on questions of law arising upon those findings, must properly be treated as separate acts of the Judge, to be dealt with, if objected to, by separate proceedings by way of appeal.

As regards the time within which in the case of a trial by a Judge without a jury the application for a new trial is to be made, the rules are in terms silent, although the words in rule 1a of Order XXXIX., "such motion shall be made within the times following unless the Court or a Judge shall enlarge the time"—referring, as they apparently do, to applications for new trials in cases tried without a jury as well as cases tried with a jury—would lead one to expect some provision governing both classes of applications. The rule, however, goes on to prescribe times for actions tried with juries alone, and the omission would seem most naturally to be supplied by the Court treating the findings of the Judge as equivalent to an interlocutory order, and as such, subject to the provisions of Order LVIII., rule 15, which fixes twenty-one days as the time within which an appeal against such order must be brought. In cases where, by virtue of Order XXXVI., rules 6, 26, 27, and 29, instead of the action as a whole being tried, special issues of fact are tried and objection is made to the findings or verdict upon such issues, the same course of proceeding as that to which we have referred in treating of the trials of actions must be adopted.

The practice of the Common Law Divisions in reference to appeals upon matters of fact being such as we have described, we should upon *à priori* grounds expect to find that the practice in the Chancery Division is substantially the same. It would be most unreasonable if a litigant party were, in one branch of the High Court, to have a year within which to appeal upon a matter which in other branches of the Court could only be made the subject of appeal within at most twenty-one days. So far as the decisions upon this point go this expectation has been realized. Where an action commenced in the Chancery Division has to be tried by a Judge with a jury, it cannot be tried by a Judge of the Chancery Division, but must be set down in the general list of

actions for trial by jury, and is tried before a Judge of one of the Common Law Divisions: *Warner* v. *Murdoch* (1); and if, after a trial so had, either party be desirous of objecting to the verdict, he must do so by motion for a new trial to a Divisional Court, in the same manner, and therefore within the same time, as if the action had been originally commenced in one of the Common Law Divisions: *Hunt* v. *City of London Real Property Company* (2). On the other hand, where, in an action commenced in the Chancery Division, an order is made directing a particular issue, whether between the parties to the action or between one of them and a third person, to be tried by a Judge without a jury, in that case the finding upon that issue is an interlocutory order, which, if objected to, must be appealed against within twenty-one days: *McAndrew* v. *Barker* (3). So far, therefore, the practice in the Chancery and Common Law Divisions appears to be in substance the same.

In the present case, however, no particular issue was, before the action came on for hearing, directed to be tried. The hearing was, in point of fact, the trial of the action; but at the commencement of the trial the Master of the Rolls ascertained that a specific issue of fact was raised between the parties, viz., the issue whether the Plaintiff had a right of way claimed by him or not; and he, therefore, tried that question of fact just in the same way as a Judge of one of the Common Law Divisions would have tried such a question in an action tried before him without a jury. Witnesses were examined upon both sides, the evidence on the part of the Plaintiff being the evidence of witnesses who proved user of the way in question, while the Defendant endeavoured to displace the case of the Plaintiff by proving that the user was not a user as of right, but a permissive and precarious enjoyment of the way. At the close of the evidence the Master of the Rolls in terms gave a verdict for the Plaintiff upon the issue of fact, reserving his judgment to a subsequent day, when, upon motion made on the part of the Plaintiff, he gave judgment for him, and made the order appealed from.

As a matter of practical argument no possible reason can be

(1) 4 Ch. D. 750. (2) 3 Q. B. D. 19.
(3) 7 Ch. D. 701.

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given why the appeal against the verdict so given should not be by application for a new trial to the Court of Appeal, in the same manner as it should have been if the action had been commenced in one of the Common Law Divisions and the Judge of one of those Divisions had been trying it instead of the Master of the Rolls. But do the rules under the Judicature Acts provide for such an application in cases tried in the Chancery Division? According to the view of two, at least, of the members of this Court who decided the case of *Hunt* v. *City of London Real Property Company* (1), they do not; and this fact was accordingly assigned as an additional reason for holding the words used in Order XXXIX., rule 1, as wide enough to include the case of an action commenced in the Chancery Division, but tried with a jury by a Judge of one of the Common Law Divisions. As, however, the decision in that case was given upon an *ex parte* application, we have thought it right to consider whether this reason was a well-founded one. The rules relating to the trial of an action, whether commenced in the Chancery or Common Law Divisions of the High Court, are to be found under Order XXXIV., and, speaking generally, those rules appear to be common to both. When, however, the rules proceed to deal with the subject of motion for new trial, which they do under Order XXXIX., they appear to drop out of consideration the case of an action in the Chancery Division tried by a Judge without a jury. It has been suggested in argument before us that the latter part of rule 1 of that Order, which provides that "where the trial has been by a Judge without a jury the application for a new trial shall be to the Court of Appeal," refers to all actions commenced in the High Court, whatever may be the Division in which they are commenced, and wherever or however they may be tried. But we are of opinion that the words "in an action in the Queen's Bench, Common Pleas, or Exchequer Division," are the governing words of the whole rule; and, therefore, that, although those words may be read, and, according to the decision in *Hunt* v. *City of London Real Property Company*, must be read so as to include actions commenced in the Chancery Division, but tried by one of the Judges of the Common Law Divisions with a jury, the rule does not include actions which are

(1) 3 Q. B. D. 19.

both commenced and tried by a Judge alone in the Chancery Division. This appears to us the plain construction of the rule itself, from the position of the words which we have called the governing words of the rule, from the joining of the two parts of the rule by the conjunctive particle, and from the use of the definite article in the expression "the trial," pointing, as it grammatically must, to the trial previously spoken of, *i.e.*, a trial in the Queen's Bench, Common Pleas, or Exchequer Division. This construction is made still plainer by a comparison of the rule with that which previously existed and for which it was substituted, and by gathering from that comparison the object (as pointed out in the case last cited) with which the new rule was framed. If, therefore, the Master of the Rolls had not tried and definitely found a verdict for the Plaintiff upon the distinct issue of fact which was in dispute between the parties upon the hearing before him, we should have been of opinion that the case was one for which no special provision is contained in the Judicature Acts or Rules, and in respect of which, therefore, the jurisdiction of the Court would, under sect. 23 of the Act of 1873, have to be exercised as nearly as may be in the same manner as it might have been exercised in Chancery before the passing of that Act, and consequently, that the appeal upon fact, as well as law, would have been in time. But, looking to the manner in which the Master of the Rolls has dealt with the case as regards the question of fact, to his definite verdict or finding upon that question, which is entered in his Registrar's book as having been given on the 6th of December, 1877, and which is proved by the shorthand writer's notes to have been orally given on that day, we are of opinion that his verdict or finding was equivalent to an interlocutory order made by him upon that day, and could only be appealed from within twenty-one days.

The case of *Sugden* v. *Lord St. Leonards* (1) may at first sight appear in conflict with this view; but we think that, upon closer inspection, that case, the circumstances of which were very peculiar, is distinguishable. There the facts proved in evidence at the trial in support of the will were not contradicted by evidence, or even disputed, and the appeal, therefore, did not really

(1) 1 P. D. 154.

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involve a question of disputed facts, but raised the question, somewhat in the same way as if the facts had been stated in the form of a special verdict, whether, upon such facts, the will and codicils which were the subject of dispute ought to have been admitted to probate; and, further, the objection to the appeal, upon which the Court decided, was rather the objection that the Appellants should have applied to the Judge who tried the action for a rehearing, before appealing, than such an objection as arises in this case. The fact in this case of the verdict being recorded in a document which records also the final judgment in the action presents no difficulty in the way of our decision. There may well be in substance two orders, when in form there is but one. There is, however, upon the face of this particular order, a statement which, if it had not been proved, both by reference to the short-hand writer's notes of the trial as well as to the Registrar's book, to be erroneous, would have negatived to some extent the allegation that the trial of and verdict upon the issue of fact were a proceeding separate, in point of time as well as of substance, from the judgment. We refer to the statement which treats the verdict and judgment as both having been given as part of one proceeding upon the date of the order—viz., the 28th of January last. But this statement is so manifestly an erroneous one that it ought to be amended, and cannot be allowed to have any effect upon our judgment; and we by no means say that even if the verdict and judgment in another case were to follow one another without any interval of time, that fact would make any difference in the treatment by us of the case, provided only the Judge clearly takes upon himself the trial of specific questions of fact, and finds his verdict upon them as a matter separate from the judgment which he gives upon that verdict. It may be suggested that where such separation is proper it should be effected through the medium of orders for the trial of questions of fact made pursuant to the provisions of rule 6 of Order XXXVI. We cannot accede to that suggestion. It may in many cases be convenient to adopt that course, and Judges will, no doubt, in such cases adopt it; but in many other cases the settlement before the hearing of the action of specific issues of fact, to be tried separately from the hearing of the action, would lead to additional expense, and sometimes

possibly to the trial of unnecessary and the omission of the trial of necessary issues. We think, therefore, that such a course as was adopted in the present case is a reasonable one; and we would add that, while it is important that in all cases where it is intended to be adopted it should be done, as here, in such a manner as to lead to no mistake on the part of the litigants as to what is being done; on the other hand, it is equally important that in all actions in the Chancery Division of the High Court, where there are distinct questions of fact in dispute between the parties to be tried by a Judge alone, Judges should try such questions as they would be tried in an action in any of the Common Law Divisions—*i.e.*, as questions the findings upon which are separate from the judgment to be pronounced upon them, and thus, by necessitating an appeal against the findings within twenty-one days, assimilate the practice of both branches of the High Court upon a point in which it is obviously reasonable that they should be alike, and, which is still more important, insure the speedy disposal by way of appeal of questions of fact, whatever may be the machinery by which they are tried.

JAMES, L.J.:—

The order of the Master of the Rolls as drawn up by the Registrar must be altered so as to make it shew that the trial and finding on the issue of fact took place on the 6th and 7th of December, and not, as appears from the order, on the same day as that on which the judgment was given.

Mr. *Hemings* then asked for an extension of the time for appealing from the verdict.

THEIR LORDSHIPS said that the Appellant had not been misled by any act of the Respondent, and, therefore, the application could not be granted.

The further hearing of the case was then adjourned.

Solicitors: *C. M. Roche; E. Burrell.*

C. A.
1879
Feb. 4.

## LOWE *v.* LOWE.

[1876 L. 241.]

*Practice—Time for appealing—Interlocutory Order—Action in Chancery Division—Trial by Judge without a Jury—Finding of Fact—Rules of Court,* 1875, *Order* XXXIX., *r.* 1*a*; *Order* LVIII., *r.* 15.

When in an action in the Chancery Division, tried by a Judge of that Division without a jury, definite issues of fact are settled at the commencement of the trial, then, whether the Judge delivers his finding on the facts and his judgment on the whole case on separate days or at one time, his finding of fact is an interlocutory order, and must be appealed from within twenty-one days.

But, if no definite issues of fact are settled at the commencement of the trial, the finding of fact as well as the judgment on the whole case may be appealed from at any time within a year.

*Krehl* v. *Burrell* (1) explained.

Statement.

THE Plaintiff in this action alleged that the Defendant had entered into a contract for the purchase of some land as agent for him, and claimed a declaration that the Defendant was a trustee of the land for him, with consequential relief.

The trial took place before Vice-Chancellor *Bacon* without a jury on the 19th, 20th, and 21st of February, 1878. The Vice-Chancellor held that the relation of principal and agent had not been proved, and gave judgment for the Defendant. No definite issues of fact for trial were settled before the trial commenced, nor was any arrangement made at the commencement of the trial that the issue of fact should be tried separately.

The judgment, as drawn up by the Registrar, bore date the 21st of February, and it stated that, "This action coming on for trial on the 19th and 20th of February, 1878, and this day before this Court, in the presence of counsel for the Plaintiff and for the Defendant, and upon reading the exhibits marked, &c., being letters produced to the Defendant on his examination taken orally on the 20th of February, 1878, and upon hearing the evidence of the Defendant upon such examination, and the evidence of, &c., upon their respective examinations taken orally before

(1) *Ante*, p. 420.

this Court on the said 20th of February, 1878, &c., this Court doth order that this action do stand dismissed out of this Court with costs to be taxed and paid by the Plaintiff." The Vice-Chancellor commenced his judgment by saying, "I quite agree that the case is now reduced to a mere question of fact." On the 27th of April, 1878, the Plaintiff gave notice of appeal from this judgment.

Argument.

Sir *H. Jackson*, Q.C., and *Russell Roberts*, for the Appellant.

*Kay*, Q.C., and *Cecil Russell*, for the Defendant, took the preliminary objection that the appeal was too late:—

The finding of the Judge on the facts is an interlocutory order, and ought to be appealed from within twenty-one days: *Krehl* v. *Burrell* (1); Rules of Court, 1875, Order LVIII., r. 15; Order XXXIX., r. 1a. In *Krehl* v. *Burrell* the finding of the Judge on the facts had been delivered on a different day from his judgment on the whole case, but Lord Justice *Thesiger*, in delivering the judgment of the Court of Appeal, said (2): "We by no means say that, even if the verdict and judgment in another case were to follow one another without any interval of time, that fact would make any difference in the treatment by us of the case, provided only the Judge clearly takes upon himself the trial of specific questions of fact, and finds his verdict upon them as a matter separate from the judgment which he gives upon that verdict." Those observations apply to the present case. The Vice-Chancellor commenced his judgment by saying that the case was reduced to a mere question of fact.

JAMES, L.J.:—The passage you have read from the judgment in *Krehl* v. *Burrell* was not meant to apply to a case where the Judge merely commenced his judgment by saying that he had to decide a question of fact; it was intended to refer to a case where in the first instance, at the commencement of the trial, the Judge said, "I will try the question of fact first," and definite issues of fact were accordingly settled for trial.

JESSEL, M.R.:—My practice is always to get the counsel on

(1) *Ante*, p. 420. (2) *Ante*, p. 430.

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both sides to agree what are the issues of fact to be tried before we start. For instance, in a patent case we settle before we begin whether the issue is novelty or infringement.

JAMES, L.J.:—It does not signify whether the verdict on the facts is given on a day prior to the judgment on the whole case, or whether both are given at the same time, provided that before the trial begins there is a distinct announcement that the issues of fact are to be tried separately. That is what we meant by the passage which has been read from the judgment in *Krehl* v. *Burrell* (1).

Sir *H. Jackson*, Q.C., and *Russell Roberts*, for the Appellant, were not heard upon the preliminary objection.

Judgment.

THE COURT (*Jessel*, M.R., and *James* and *Bramwell*, L.JJ.) overruled the objection.

The appeal was then heard upon the merits, and was dismissed with costs.

Solicitors for Plaintiff: *Chester & Co.*, agents for *Roberts & Dickson, Chester.*

Solicitors for Defendant: *Norris, Allens, & Carter*, agents for *Barrow & Cook, St. Helen's.*

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C. A. 1879 Feb. 6.

## *Ex parte* SHEFFIELD. *In re* AUSTIN.

*Undischarged Bankrupt—Interest in possible Surplus of Estate—Mortgagee of Surplus—Examination of alleged Creditor—Bankruptcy Rules*, 1870, *r.* 166.

A trustee in bankruptcy is not a trustee of the surplus of the estate for the bankrupt.

The bankrupt, while undischarged, has no interest in the surplus beyond a mere hope or expectation, and he cannot, by assigning the surplus by way of security, give to his assignee any right to interfere in the administration of the estate, as, for instance, by examining an alleged creditor with respect to his claim.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 9th of November, 1876, the Court of Appeal (2) gave

(1) *Ante*, p. 420. (2) 4 Ch. D. 13.

C. A. 1879 *Ex parte* SHEFFIELD. *In re* AUSTIN.

leave to *Austin*, a bankrupt, to examine *Henry Gibbon* with respect to a proof for a large amount which he had tendered against the bankrupt's estate. It appeared that if this proof was admitted there would not be enough to pay the creditors in full, but that if it was rejected there would probably be enough to pay all the creditors in full, and leave a surplus. No examination having taken place in pursuance of the order, Messrs. *Sheffield & Sons*, who had acted as the solicitors of a Mr. *Hayward*, who had formerly been the trustee of the bankrupt's estate, but who had been removed from his office, applied to the Court to appoint a private sitting for the examination of *Gibbon* with regard to his proof against the estate. *Sheffield & Sons* deposed that the bankrupt was indebted to them in the sum of £350 for cash advanced since his bankruptcy on the security of his surplus estate, and also for other moneys, costs, and expenses, and that he had assigned, or agreed to assign, that surplus to them as security. They also alleged that without their knowledge an arrangement had been come to between the bankrupt and *Gibbon* for the abandonment of the proposed examination under the order of the Court of Appeal, *Gibbon* having notice of the charge in favour of *Sheffield & Sons*. *Sheffield & Sons* offered to pay the expenses of the examination for which they asked. The bankrupt had not obtained his discharge.

Statement.

The Registrar refused the application.

*Sheffield & Sons* appealed.

*Benjamin*, Q.C., and *Whitehorne*, for the Appellants:—

Argument.

The Appellants have such an interest in the surplus as entitles them to the order for which they ask.

[JESSEL, M.R.:—The previous order of this Court was made under rule 166, which does not in terms apply to you.]

We really stand in the shoes of the bankrupt. His only interest in the matter is in respect of the surplus.

JESSEL, M.R.:—The bankrupt has no property in the surplus. The trustee is not a trustee of it for him. He has nothing more than a mere hope or expectation.

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JAMES, L.J.:—The Appellants stand in no better position than a tradesman who had given the bankrupt credit after the bankruptcy. Could such a person come in and interfere in the bankruptcy? A bankrupt cannot in this way create a right of interference in the administration of his estate. The mischief would be enormous. A bankrupt can do nothing to embarrass the administration of his estate.

*Hemming*, Q.C., and *Yate Lee*, for the trustee, were not heard.

Judgment.

THE COURT (*Jessel*, M.R., and *James* and *Bramwell*, L.JJ.) dismissed the appeal with costs.

Solicitor for Appellants: *C. A. Powell.*
Solicitors for Trustee: *Tilley & Soames.*

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## LEVY *v.* WALKER.

[1878 L. 275.]

C. A. 1878 V.-C. H. Dec. 12, 13, 21.

*Partnership—Sale of Goodwill and Business—Right to use Partnership Name.*

C. A. 1879 Feb. 5.

Two ladies, *V. C.* and *M. W.*, carried on business in *London* in partnership under the firm of *C. & W.* *V. C.* married *L.* After this a decree for dissolution was made, and it was ordered that "the said partnership business, and the leasehold premises, trade fixtures, stock-in-trade, goodwill, and business," should be sold as a going concern to *M. W.* or to *L.* and wife, whichever should be the highest bidder. *M. W.* became the purchaser of all the property directed to be sold. *L.* and wife, who carried on business in *Paris* under the firm of *C. et Cie*, commenced an action to restrain *M. W.* from carrying on the business under the style or firm of *C. & W.*:—

*Held*, by *Hall*, V.C., that the assignment of the goodwill did not include the right to use the name of a living person, and that an injunction ought to be granted.

*Held*, on appeal, that *L.* and wife had no right to restrain *M. W.* from using the name of the old firm.

*Per James*, L.J.:—The assignment of the goodwill and business included the exclusive right to use the name of the old firm.

Statement.

IN November, 1875, Mdlle. *Charbonnel* and the Defendant *Minnie Walker* commenced carrying on business in *Bond Street, London*,

as Parisian Confectioners and Bonbon Manufacturers, in partnership under the firm of "*Charbonnel & Walker.*" On the 20th of November, 1877, Mdlle. *Charbonnel* married *S. A. Levy.* An action of *Walker* v. *Levy* was commenced for a dissolution of the partnership, and by a judgment dated the 16th of April, 1878, it was by consent ordered that the partnership should be dissolved from the date of the judgment. And it was among other things ordered "that the said partnership business, and the leasehold premises, trade fixtures, stock-in-trade, goodwill, and business, be forthwith sold as a going concern, with the approbation of the Judge, to the Plaintiff or the Defendants, whichever shall be the highest bidder or bidders." And it was also ordered "that a proper deed of assignment (to be settled and approved by the Judge in case the parties differ) be executed by the non-purchaser or non-purchasers within fourteen days after the same shall be tendered for execution." The dissolution of the partnership was duly advertised. On the 22nd of May, 1878, the biddings took place before the Chief Clerk, and the whole property directed to be sold was purchased by Miss *Walker,* who from that time continued the business under the style of *Charbonnel & Walker.* Mr. and Mrs. *Levy* lived in *Paris,* and at the time when the present action commenced were carrying on business there under the style of "*Charbonnel et Cie.*"

The draft of a deed of assignment pursuant to the order was prepared. By the first witnessing part Mr. and Mrs. *Levy* assigned to Miss *Walker* their interest in the leasehold premises on which the business was carried on, and as to this there was no dispute. As to the form of the second witnessing part the parties differed, and it was settled by the Judge, who varied the draft as prepared on behalf of Miss *Walker,* by striking out the second passage in brackets, and inserting the first clause in brackets as given below.

"They the said *S. A. Levy* and *Virginie E. Levy* do and each of them doth hereby assign, transfer, and release unto the said *M. Walker,* her executors, administrators, and assigns, All that the right share and interest of the said *S. A. Levy* and *V. E. Levy,* and each of them, in and to the said business of Parisian Confectioners and Bonbon Manufacturers, carried on by the said late firm of Mesdames *Charbonnel & Walker* at 173 *New Bond Street* afore-

C. A. 1879 LEVY v. WALKER. Statement.

said, and the goodwill thereof [including the right to represent that the business as recently carried on by Mesdames *Charbonnel & Walker* is now being carried on by the said *Minnie Walker*], and in and to all and singular the trade fittings, fixtures, and stock-in-trade, machinery, implements of manufacture, furniture, articles and effects, whether used in relation to the said business or not, now in or about the said leasehold premises No. 173 *New Bond Street* aforesaid [together with the exclusive right of the said *Minnie Walker* to the said name of '*Charbonnel & Walker*']: To have and to hold," &c.

On the 3rd of July, 1878, Vice-Chancellor *Hall* made an order that the assignment should be executed in this altered form. Miss *Walker* appealed from this order, and on the 13th of November, 1878, the Court of Appeal ordered that the draft assignment should be varied, and should follow the words of the judgment of the 16th of April, 1878.

Previous to this Mr. and Mrs. *Levy* had complained of Miss *Walker's* carrying on the business under the style of *Charbonnel & Walker*, and on the 4th of September they moved for an injunction to restrain her from using that name, but on Miss *Walker's* giving an undertaking to abide by any order the Court should make, if it should thereafter be of opinion that Mr. and Mrs. *Levy* should have sustained any damage by reason of Miss *Walker* using the name of *Charbonnel & Walker*, no order was made on the motion except that the costs thereof should follow the costs of the appeal from the order of the 3rd of July, 1878. The result of that appeal having been to leave the question as to the right to use the name undecided, Mr. and Mrs. *Levy* commenced the present action for an injunction to restrain Miss *Walker* from carrying on the business in the name of *Charbonnel & Walker*.

The name of "*Charbonnel & Walker*" was the only one appearing on the shop, and Miss *Walker* ordered goods in that name, but kept her banking account in her own name. She deposed that prior to the 27th of August, 1878, she gave notice of the dissolution, and of the fact that she was carrying on the business alone, to all the persons from whom the partnership had bought goods from its commencement, except certain persons whom she

named with whom the firm had not for a long time before the 22nd of May, 1878, had any dealing, and with whom, as she deposed, she had not subsequently had any dealings. Some of the persons, however, to whom Miss *Walker* alleged that she had sent notices, deposed that they had not received them, and that they had gone on dealing with her without being aware of the dissolution.

Statement.

The Plaintiffs moved for an injunction to restrain Miss *Walker* from carrying on the business, either alone or in partnership with any other person, under the style or firm of *Charbonnel & Walker*, and from holding out that the Plaintiffs, or either of them, were or was in partnership with her. The motion came on to be heard before Vice-Chancellor *Hall* on the 12th of December, 1878.

Argument.

*W. Pearson*, Q.C., and *Pauli*, for the motion :—

The rule of law is that when a partner purchases the goodwill of a business he has a right to represent himself as carrying on the business as successor to the firm, and that was all that *Banks* v. *Gibson* (1) decided. The purchaser here has obtained no right by merely purchasing the "goodwill" to use the name of *Charbonnel* in the business. To do so would have a prejudicial effect upon the business in *Paris*, as it would indicate to the world that the Plaintiff, who has borne that name, is a partner in the Defendant's business, although she is married to Mr. *Levy*. It also affects Mrs. *Levy*, *née Charbonnel*, in this way, that she may establish an independent business in *London* under her maiden name, or as Mrs. *Levy*, formerly of the firm of *Charbonnel & Walker;* and further, persons having business transactions with the Defendant may think that Mrs. *Levy*, though married, is in some way liable to them. The Plaintiffs are not bound to take any risk upon themselves, even if the Defendant has given notice of the dissolution to those persons who have supplied the firm with goods; and therefore the Defendant has no right to enter into any contracts in the name of *Charbonnel & Walker*. The Defendant may be allowed to carry on business in her own name as "late" *Charbonnel & Walker*, or as "successor to" *Charbonnel & Walker*," but she cannot be permitted to use the name "*Charbonnel*" with her

(1) 34 Beav. 566. 11 Jur 45.660

C. A. 1879 LEVY v. WALKER. Argument.

own in any other way. To hold out to the world that the firm is "*Charbonnel & Walker*" will be a distinct misrepresentation and ought not to be allowed; therefore the injunction should be granted.

*Hastings*, Q.C., and *Chubb*, for the Defendant:—

There has been here a sale of the "goodwill," and the symbol of it is the trade-name, which, in this case, is over the shop door and in the shop. By the dissolution the agency for the firm of the succeeding partner has been withdrawn, and she cannot contract except in her own name, and therefore Mrs. *Levy* cannot be under any liability to creditors, as her name is not being used in any transaction with them. The proposition that the sale of the goodwill carries with it the right to use the name of the old firm is distinctly supported by the observations of Vice-Chancellor Sir *W. Page Wood* in *Churton* v. *Douglas* (1), and therefore the Defendant is entitled to use the name which represents the goodwill. She has acquired the right to keep that name over her door, and this right is fully borne out by the decision in *Webster* v. *Webster* (2). No damage can be inflicted upon the Plaintiffs, but the *onus* is upon them to shew that they apprehend it, as they come to the Court for an injunction. That which the Defendant has done does not affect the right of the Plaintiffs to trade under the name of "*Charbonnel*," and there can be no substantial objection to it as regards those persons who have dealings with the Defendant, as they know that Mrs. *Levy* is not now connected with this business; that she has gone to reside in *Paris*, and has no intention of setting up business in *London*. Those persons have had notice of the dissolution, and as there can be no liability to them, and no damage to the Plaintiffs, the motion ought to be refused.

*W. Pearson*, in reply.

Judgment, V.-C. H.

HALL, V.C., after stating the facts set forth *ante*, continued:—

The Defendant has since the purchase by her carried on, and is now carrying on, the business upon the leasehold premises in *New Bond Street* under the name of "*Charbonnel & Walker*," and she

(1) Joh. 174. (2) 3 Sw. 490, n.

claims the right to continue so to do, her contention being that in the goodwill assigned to her there was comprised the right to use that name. The Plaintiffs deny this, and seek to restrain the user by the Defendant of that name. The Defendant relies upon the decision in the case of *Webster* v. *Webster* (1), where the question raised was between the representatives of a deceased partner and the surviving partner, and therefore that case is not, I think, in point. The Defendant further relies upon *dicta* of Vice-Chancellor Sir *W. Page Wood,* in the case of *Churton* v. *Douglas* (2), which were (3) that goodwill meant every advantage that had been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm; that (4) the name of a firm is a very important part of the goodwill; that trade-mark and name of the firm were the same thing; and that the name is an important part of the goodwill of a business is obvious when we consider that there are at this moment large banking firms and brewing firms and others in the metropolis which do not contain a single member of the individual name exposed in the firm; the Vice-Chancellor added: "But, it was argued, admitting that to be so—admitting that in this case the defendant, by assigning to the plaintiffs all his share in the goodwill of the business, handed over to them all the benefit of representing themselves to the world as carrying on the very identical business which was previously carried on by the firm of '*John Douglas & Co.*,' it does not follow that the plaintiffs acquired, by virtue of that assignment, a right to use the name of that firm simpliciter, especially as it contained the name of but one individual person, and that the name of the defendant himself. Inconvenience might naturally result to the defendant from having his name so exposed. That argument may be very true, but the answer is, that the plaintiffs have never asserted any such right. They have never claimed the right to call themselves '*John Douglas & Co.*' simpliciter. They applied to the defendant for leave so to call themselves, and he declined to give them such leave. What they claimed is the right to refer to themselves as succeeding the

(1) 3 Sw. 490, n.
(2) Joh. 174.
(3) Joh. 188.
(4) Ibid. 189.

C. A. 1879 LEVY v. WALKER. Judgment, V.-C. H.

former firm, by using the words 'late *John Douglas & Co.*'—in other words, the right to identify their house of business as the house of business formerly carried on by *John Douglas & Co.* And that, I apprehend, they were entitled to do under the sale of all the defendant's share in the goodwill of the business;" and there are (1) other observations to the same effect.

It would seem, therefore, that Vice-Chancellor Sir *W. Page Wood* considered that the sale of "goodwill" carried with it the right to use the name of the firm, at least, when it was, as it apparently was, in the case of *Churton* v. *Douglas*, a firm such as not to be descriptive by name of the individual partners, but that if the use of names as appearing in the firm might occasion inconvenience to an individual partner who had assigned his interest in the goodwill, that partner might object to such user. In that case the purchasers of the share of the Defendant after the purchase carried on business under their own names, merely adding "late *John Douglas & Co.*," and that the Vice-Chancellor considered was allowable, but he restrained the Defendant from trading under the name of "late *John Douglas & Co.*," although *John Douglas* was his own name. In that case it appeared that the Defendant was using the words, "late *John Douglas & Co.*," with the intent and purpose of injuring the Plaintiffs, as purchasers of his share in the old concern. The Defendant also relies on the case of *Banks* v. *Gibson* (2), where Lord *Romilly* held that on a dissolution each of two partners could use the name of the old firm. In that case the name, "*Banks & Co.*," was not the name of the two partners at the time of the dissolution, but of a firm existing before the two partners became partners, and before either of them carried on the business. It was the case of an old firm, such as the names of "*Child & Co.*" and "*Coutts & Co.*" being used; and it was a peculiar case, and does not govern the one now before the Court; and it may be observed that the decision has been questioned by Mr. Justice *Lindley*, in the 4th edition of his book on Partnership (3). A person's name is his property, as Lord *Cairns* said in the case of *Maxwell* v. *Hogg* (4), where (5) he dissented

(1) Joh. 189, 190.
(2) 34 Beav. 566.
(3) Page 862.
(4) Law Rep. 2 Ch. 307.
(5) Law Rep. 2 Ch. 310.

from the decision in the case of *Clark* v. *Freeman* (1). Mr. Justice *Lindley*, in the same edition of his book (2), in discussing the question, remarks upon the risk (which he had dealt with in an earlier part of the book) that a late partner is exposed to by allowing his name to be continued in a business, and his opinion seems to be favourable to the right of the late partner to object to the continued user of his name. Suppose such a case as that of *A. B.* commencing and carrying on business in the name of *A. B.*, and his taking into partnership his shopman *C. D.*, or some other person—the business being continued to be carried on in the name of *A. B.*—and of the partnership being dissolved by a judgment of this Court, and of *C. D.* purchasing, and having assigned to him the business, including the goodwill. Would *C. D.* have the right to carry on the business in the name of *A. B.*? I think not. There is not, I believe, any authority for saying that *C. D.* could do so, and I should hold that he could not. If not, is the case different where the names of the two partners have been used? I think not. The Plaintiffs are at present residing and carrying on business in *Paris*, and it was contended that no damage was shewn to have accrued to them, or can, in fact, accrue to them, it being said that the female Plaintiff sues as Mrs. *Levy*. It must, however, be remarked that after her marriage her maiden name was retained and continued in the business until the dissolution, and that the rights of the Plaintiffs, and each of them, are such as they were at the dissolution, and that the *Paris* business is carried on in the name of "*Charbonnel*," with or without "*et Cie*" being added, and there is nothing to prevent the Plaintiffs having an establishment in *London*. It was said on behalf of the Defendant that notice of the dissolution and acquisition of the business by the Defendant had been given to all the old creditors of the firm, but this has not been made out, and if it had been, it does not appear to me that it would have deprived the female Plaintiff of the right to say, "You are using my name, *i.e.*, my property;" nor do I think that even if such notice had been given, it would be satisfactory, as the Plaintiffs might be involved from not being able to establish the notice.

It seems to me that the question whether "goodwill" does ordi-

(1) 11 Beav. 112. (2) Page 863.

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narily include the right to use the name of a living person should receive one general answer, viz., that it does not. Great inconvenience would, I think, arise from trying every case with reference to special considerations of more or less probability of inconvenience or loss. I may here observe that it does not appear in evidence where the Plaintiffs' contracts with vendors to the firm were entered into, but the Defendant's counsel admitted that some of them were entered into in *Paris*. It may be that there are, and it is probable that there are, contracts regulated by French law, and I cannot say that there is not a reasonable apprehension of inconvenience and embarrassment by claims being made upon the Plaintiffs if the Defendant continues to trade under the old name.

It was said that no actual damage is proved, but I consider that there is jurisdiction without such proof, and even although no action for damages would lie. As to this I may refer to the observations of the Judges in the case of the *Emperor of Austria* v. *Day* (1).

I have already mentioned what Lord *Cairns* said in the case of *Maxwell* v. *Hogg* (2), and I consider that there is no defence to this action founded on delay in taking the proceedings.

The injunction must be granted according to the notice of motion, and a time must be fixed for its commencement, the day being not before the first day of the Hilary Sittings, 1879.

C. A.

The Defendant appealed. The appeal was heard on the 5th of February, 1879.

Argument.

*Hastings*, Q.C., and *Chubb*, for the Appellant:—

We contend that the assignment of the goodwill carries the right to use the partnership name.

[JESSEL, M.R.:—I do not see what right the Plaintiffs have to interfere. Their name is not *Charbonnel*, and they do not carry on business in *London*. Even if the name had been the name of the Plaintiffs, could they complain when they do not carry on business in *England*? Can *David Jones* who is not in trade interfere to prevent any one from carrying on business in the name of *David Jones*?]

(1) 3 D. F. & J. 217. (2) Law Rep. 2 Ch. 307.

We submit not. The Vice-Chancellor seems to have thought that the Plaintiff would incur some liability, but that is not so: *Newsome* v. *Coles* (1). The creditors all received notice from the Defendant.

[JESSEL, M.R.:—That was not necessary; it was for the Plaintiffs to give them notice if they feared liability.]

[They were then stopped by the Court.]

*W. Pearson*, Q.C., and *Pauli*, for the Plaintiffs:—

A business carried on under the firm of *A. & B.* is sold to *B.*, who goes on trading under the same style. Inconvenience might arise to *A.* if persons who dealt on with the firm went on dealing without knowing of the change; it is not like the case of carrying on the business in the name of a person who never had any connection with it.

[JESSEL, M.R.:—If notice is given to the persons who dealt with the firm during the partnership no inconvenience can arise.

JAMES, L.J.:—I have always understood that if a partnership is dissolved, each partner, in the absence of agreement to the contrary, may use the name of the firm.]

I know of no case which lays down that doctrine to its full extent, where the partnership name was made up of the names of the partners, and was not a fictitious name, such as the Bonbon manufacturing company.

[JAMES, L.J., referred to *Banks* v. *Gibson* (2).]

That case is distinguished by the Vice-Chancellor. No case decides that where *A. & B.* dissolve partnership, the name of "*A. & B.*" will pass on a sale of the goodwill.

[JESSEL, M.R.:—Is there any authority shewing that a man has such a property in his name that he can prevent another person from using it where the principle of trade-mark does not come in, except the *dictum* in *Maxwell* v. *Hogg* (3), which does not seem to have been well considered. A man can assume what name he pleases.]

(1) 2 Camp. 617. (2) 34 Beav. 566. (3) Law Rep. 2 Ch. 307.

C. A. 1879

LEVY v. WALKER.

Argument.

A man cannot have any right to get credit by the use of another person's name.

[JESSEL, M.R.:—If *A. B.* says "I am *C. D.* of such a place," and gets credit on the faith of it, he may be indicted by the persons who are deceived, but how can *C. D.* interfere?

BRAMWELL, L.J.:—How can you suffer damage?]

If goods are ordered in the name of *Charbonnel & Walker* the Plaintiffs may be sued.

[JESSEL, M.R.:—But such an action could not be sustained. Is there any decision that a sale of the goodwill does not carry the right to use the name?]

We are not aware of any decision either way.

[JESSEL, M.R.:—The name is part of the assets: *Hall* v. *Barrows* (1).]

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

This is an appeal from an order of Vice-Chancellor *Hall* restraining the Defendant, Miss *Walker*, from carrying on the business of Parisian confectioner and bonbon manufacturer, either alone or in partnership with any other person or persons, under the style or firm of *Charbonnel & Walker*, and from holding out that the Plaintiffs, or either of them, are or is in partnership with the Defendant.

The facts are these: Miss *Charbonnel* and Miss *Walker* were in partnership as confectioners in *Bond Street*, under the name of *Charbonnel & Walker*. The firm name was not the real name of anybody. It was compounded of or derived from the surnames, that is, portions of the names of the two partners. The partnership was dissolved by reason of the marriage of Miss *Charbonnel* with a Mr. *Samuel Arthur Levy*, whereupon she became Mrs. *Levy*, and then the partnership accounts being taken in the Chancery Division, the business of the partnership was sold to Miss *Walker*, who bought the lease, the stock-in-trade, goodwill, and business of *Charbonnel & Walker*. I am not now going to say whether or not that carried with it the exclusive right to use the name of

(1) 4 D. J. & S. 150.

*Charbonnel & Walker*, but I must not be supposed to intimate any contrary opinion by not putting my judgment on that ground. That being the position of matters, Miss *Walker* continued to carry on the business as before in the old shop and under the old firm name of *Charbonnel & Walker*. Mr. and Mrs. *Levy* started a similar business in *Paris* under the name of *Charbonnel et Cie*, and then Mr. and Mrs. *Levy* bring an action in *London* to restrain Miss *Walker* from carrying on her business under the old firm name of *Charbonnel & Walker*, and the Vice-Chancellor has granted an injunction.

Judgment, C. A. Jessel, M.R.

Now, speaking with the most sincere deference to his Lordship, I am utterly at a loss to conceive on what ground his judgment was founded. The Plaintiffs are under no liability by reason of Miss *Walker* so carrying on the business. The Plaintiffs are not actual partners in the firm of *Charbonnel & Walker;* the dissolution decreed by the Court has been duly advertised, and no person dealing with Miss *Walker* for the first time can make Mr. or Mrs. *Levy* liable. Notice has been given to all the persons who dealt with the firm at the dissolution, and none of them can make Mr. or Mrs. *Levy* liable. What conceivable interest the Plaintiffs have in the question as to the firm name under which Miss *Walker* chooses to carry on the business, I have been unable to ascertain. She has the right to use the name of *Charbonnel & Walker* unless some one else has a title to prevent her so using it. Mr. and Mrs. *Levy* appear to me to have no such right. Even if their name had been *Charbonnel*, as they are not carrying on business in *London*, and are not being interfered with in the use of any trade-mark of theirs, I do not see how they could interfere with anybody who chooses to carry on business under the name of *Charbonnel & Walker* as a fancy name. It appears to me that the Plaintiffs have no right to sue, and that on this ground the injunction should have been refused, which order must now be made.

James, L.J.

JAMES, L.J.:—

I am of the same opinion. It should never be forgotten in these cases that the sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on

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is a right in the nature of a trade-mark, that is to say, a man has a right to say, "You must not use a name, whether fictitious or real—you must not use a description, whether true or not, which is intended to represent, or calculated to represent, to the world that your business is my business, and so, by a fraudulent misstatement, deprive me of the profits of the business which would otherwise come to me." That is the principle, and the sole principle, on which this Court interferes. The Court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything. If there is any misleading, that may be for the Criminal Courts of the country to take notice of, or for the Attorney-General to interfere with, but an individual Plaintiff can only proceed on the ground that, having established a business reputation under a particular name, he has a right to restrain any one else from injuring his business by using that name.

Now, in this case how it is possible that persons carrying on business in *Paris* under the style of *Charbonnel et C^ie^* can pretend to say that persons conducting an old business of *Charbonnel* and *Walker* in *London* are representing themselves as being the firm of *Charbonnel et C^ie^* in *Paris*, I am utterly at a loss to conceive. If that is not so, it seems to me that there is really no ground for this suit.

But there is another point upon which I myself cannot entertain any doubt, which is this, that the assignment of the goodwill and business of *Charbonnel & Walker* did convey the right to use the name of *Charbonnel & Walker*, and the exclusive right to use that name as between the vendor and the purchaser of that business. Whether it would prevent another person from afterwards using the name of *Charbonnel*, I do not say; but the trade name, made up of parts of two real names, as the Master of the Rolls says—the trade name of *Charbonnel & Walker* (whether it was entirely a fictitious name can make no difference)—was the name of the business, and that business was sold. That was a name with which every article sold might have been impressed, just as in the case of *Millington* v. *Fox* (1), where the name was continued as part of the

(1) 3 My. & Cr. 338.

designation of the article sold. I think it right to say that the sale of the goodwill and business conveyed the right to the use of the partnership name as a description of the articles sold in that trade, and that that right is an exclusive right as against the person who sold it, and an exclusive right as against all the world, so that no other person could represent himself as carrying on the same business. I am of opinion that the Vice-Chancellor ought not to have granted the injunction, and that it must be dissolved.

Judgment, C. A. James, L.J.

BRAMWELL, L.J.:—

Bramwell, L.J.

I am of the same opinion. An injunction is granted to prevent damage, or the violation or the infringement of a right. Now, I cannot see that any right is violated, and I cannot conceive a possible case of damage from what has been done. It seems to me that no action could possibly lie at common law for that which is made the subject of this injunction. Therefore I entirely agree with the judgment which has been pronounced.

By consent an order was made dismissing the action with costs.

Solicitors: *Lee & Pemberton; Richard Furber.*

M. R. *In re* FOREST OF DEAN COAL MINING COMPANY.

1878
Dec. 14.

*Company—Winding-up—Promotion Money—Director, Liability of, for alleged Misfeasance—Companies Act*, 1862, *s.* 165.

17 Ch D. 124
21 Ch D 522-5
529

Upon the formation of a company promotion money had been improperly paid, of which *B.* was cognizant though not a party thereto. *B.* subsequently became a director, but took no steps to recover the money for the company.

The company was now being wound up. On a summons by the liquidator to make *B.* liable under the above circumstances:—

*Held*, that *B.* was not liable for wilful default or for misfeasance under sect. 165 of the *Companies Act*, 1862.

Statement.

THE *Forest of Dean Coal Mining Company* was formed in 1873 for the purchase of certain collieries of which *J. F. Corbett* was the owner.

In the negotiations for the purchase, in 1872, it was agreed that the purchase-money for the collieries should be £35,000, to be paid by the company partly in money and partly in shares; and it was agreed between *Corbett* and *J. F. Johnson*, the promoter of the company, that *Johnson* and his nominees should receive out of the purchase-money £10,000 for its promotion, which sum was subsequently paid to them. At that time *Osman Barrett* had a mortgage on the collieries for £7000, and it was agreed that he should join in the conveyance, and take a fresh mortgage for the same amount. The property was accordingly conveyed to the trustees of the company, and a fresh mortgage executed.

*Barrett* was informed by *Corbett* at the time of these transactions of the payment of the said sum of £10,000, but he was not then a shareholder in the company nor one of the proposed directors. He afterwards qualified, and, in December, 1875, he became a director, but he did not take any steps towards recovering for the company the said sum of £10,000.

In 1877 an order was made for winding up the company, and the liquidator now applied, by way of adjourned summons, to make *Johnson* and his nominees liable to repay to the company the said sum, and also to make *Barrett* liable for his alleged misfeasance in not taking steps to recover the money of the payment of which he was cognizant.

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Argument.

The main question was whether, under the above circumstances, *Barrett* was to be made liable.

*Chitty*, Q.C., and *Whitehorne*, for the liquidator, in support of the summons:—

There is no question as to the liability of *Johnson* and his nominees to refund the sum of £10,000, which was improperly paid to them out of the purchase-money of the collieries, but we contend that *Barrett* is also liable. He was at the time of the purchase mortgagee of the collieries, and it will not be disputed that he was cognizant of the transaction. He subsequently became a director, and then it was his duty to communicate to the shareholders the misappropriation of the company's property and to move his co-directors to take steps to recover the money. He is in the position of a trustee who has been guilty of wilful default. At any rate, he is within the terms of sect. 165 of the *Companies Act*, 1862, inasmuch as he is a past director who "has been guilty of a misfeasance or breach of trust in relation to the company."

*Davey*, Q.C., and *Bush*, for Mr. *Barrett*, were not called on.

Judgment.

JESSEL, M.R.:—

I am quite clear about this case. One must be very careful in administering the law of joint stock companies not to press so hardly on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the Court should do its utmost to bring fraudulent directors to account, and, on the other hand, should also do its best to allow honest men to act reasonably as directors.

Wilful default no doubt includes the case of a trustee neglecting to sue, though he might by suing earlier have recovered a trust fund,—in that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle. Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called

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managing partners, it does not much matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it. They are bound, no doubt, to use reasonable diligence having regard to their position, though probably an ordinary director, who only attends at the board occasionally, cannot be expected to devote as much time and attention to the business as the sole managing partner of an ordinary partnership, but they are bound to use fair and reasonable diligence in the management of their company's affairs, and to act honestly.

But where without fraud and without dishonesty they have omitted to get in a debt due to the company by not suing within time, or because the man was solvent at one moment and became insolvent at another, I am of opinion that it by no means follows as a matter of course, as it might in the case of ordinary trustees of trust funds or of a trust debt, that they are to be made liable. Traders have a discretion as to whether they shall sue their customers, a discretion which is not vested in the trustees of a debt under a settlement. In fact the customers of a trading partnership are very often allowed time, because the partners may think that, if they do not allow them time, they will drive the customers into bankruptcy and so suffer a greater loss than by giving them time; indeed they not only very often give them time, but they lend them money or sell them goods in the hope that better times may come and enable them to pay their debts.

Again, it may very often be most injurious to the trading concern to sue some of their debtors after the first few losses, because driving some of their debtors into bankruptcy might be very injurious to the trade, more so, in fact, than the chance of suffering a loss by letting them go on without taking action against them. Such a case as this has, in my opinion, no direct relation to the rule which makes it incumbent on a trustee to sue a debtor at once under pain of having the liability for the debt afterwards thrown upon him, on the ground that if he had sued he could have got the money. On the other hand, as we know, a debtor must be presumed to be solvent unless the trustee can shew he was insolvent.

But in my opinion no such liability attaches to directors of joint stock companies. They must, as ordinary managing partners of a trading concern, be allowed a discretion, and not be too much interfered with by the Court, or have inquiries made by the Court as to whether the debtor could have paid at a particular moment a larger or a smaller amount if he had been sued. So much with regard to ordinary debts.

Again, directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company. The company is the creditor, and, as I said before, they are only the managing partners. In my opinion it is extravagant to call them trustees of a debt when it has not been received. You may of course have an actual trust of a debt, as in the case I put before, where trustees have assigned to them a debt to get in, but that is not the case with directors of a company. A director is the managing partner of the concern, and although a debt is due to the concern I do not think it is right to call him a trustee of that debt which remains unpaid, though his liability in respect of it may in certain cases and in some respects be analogous to the liability of a trustee. So much for the question of unpaid debts.

The next point is this: does that reasoning which applies to a debt apply to a demand of this kind, which is a liability, though not strictly a debt? I do not think it does. There are totally different considerations applicable to this kind of demand or liability from those applicable to an uncontested debt.

Analogy or illustration is sometimes useful. In the case of trustees newly appointed, their liability extends to seeing that they get the trust funds into their hands; but did anybody ever imagine that their liability extended beyond that, or that they are bound to inquire into all the dealings with the trust fund from the origin of the trust, and to pursue every past trustee who might by any means whatever have become liable to pay more than the actual trust funds? The case I would put in illustration is this: suppose a trust of £10,000 consols, and one of the trustees with the connivance of the other sells out the stock and engages with it in trade; ten years afterwards he replaces it; five years after

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that the trustees retire, and new trustees are appointed in their place, who find the fund intact. One of the trustees is then told, "It is all right now, but the money has only been paid in five years before," and is told that one of the former trustees had used it in his trade. It is intolerable to suppose that the new trustee should be made liable for not filing a bill, as it was formerly under the old procedure, or bringing an action, as it is now, against the former trustee, or his representative supposing he is dead, with the view of getting from him either the extra interest over and above the interest of the consols, or the profits he might have made from the use of the money in his business. Is that sort of liability on the part of a former trustee one which the new trustee is bound to enforce, though no doubt it would be one which the *cestui que trust* has power to enforce? In my opinion it would be extending the liability of trustees, which in my judgment is quite heavy enough as the law stands, to a point to which it has never been stretched before; and, as I have said before, I think if there has been any error at all in the course taken by the Courts of Equity against trustees it has been in pressing honest trustees too far, one result of which has been that it is now very difficult to get people to accept offices of trust for which they receive no remuneration, and in respect of which they may be placed under great liabilities. I am always ready to make, and have always been desirous of making, a dishonest man liable for every farthing of which he has defrauded a trust, and of making him liable also to pay exemplary damages or interest in every case in which the law will allow it; but at the same time I have always thought it would have been much more wise in Courts of Equity had they been less strict as regards mere omissions, or even what they have chosen to call neglect, on the part of persons who endeavour honestly and faithfully to perform their trust, but who notwithstanding, either from some mere mistake, or some error in law or of judgment on the part of themselves or their legal advisers, or of some defalcation on the part of their agents, have been made liable sometimes for vast sums of money, although they had taken every possible pains to appoint proper solicitors and counsel, and to engage proper agents to advise them, and to manage the estates, and to receive the rents and profits of them.

Therefore, I think it is not the duty of a Judge to strain or stretch the law so as to make it apply to new liabilities, and if such a case as I have mentioned came before me I certainly should not hold the new trustee liable.

Now, to apply these observations to the actual case before me, I must first of all consider what the position of the Respondent *Barrett* was here, and I find that he was mortgagee of the vendor, and a mortgagee, as I understand, for some £7000. The vendor had a mine worth, to sell, £25,000. A company was formed to buy the mine, and the promoters of the company induced the vendor to do what was no doubt very wrong, and indeed amounted to a fraud on the company, namely, to add nominally £10,000 to the purchase price, so as to make the actual purchase price to the company £35,000 instead of £25,000, so that the company was to pay to the vendor £35,000 in money and shares, and the directors were to divide the plunder or extra sum between themselves and the promoters. Of course as regards all these promoters, some of whom are not now accessible, there can be no question of their liability for what was no doubt a gross fraud. The vendor got nothing by it except this, that he got £25,000 for his mine, which probably was not very readily saleable at that price, and no doubt, therefore, he had an interest in the matter to that extent. But still we must not forget that the company has affirmed the sale for £25,000, taking away the profits of the directors, and it cannot be possible, therefore, for the liquidator to say now that it was not a good sale to the extent of £25,000.

Now, Mr. *Barrett* as mortgagee knew of the transaction, and he got paid to some extent, not out of the £10,000, because he got none of that, but out of the £25,000. Therefore he did not receive any part of the plunder, and he is not responsible on that ground any more than you could make the vendor responsible for any part of the £25,000 on the ground that he would not have got as much as £25,000 if he had not assented to it. But the ground on which it is sought to make Mr. *Barrett* liable is this:—

The transaction took place in 1872, and he became a director of the company in December, 1875. In 1877 the company went into liquidation, and it is said that, having knowledge when he was appointed a director of the company of the facts I have mentioned,

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it was his duty to communicate that knowledge, acquired by him three years and a quarter before he became a director, to the shareholders of the company; and that it was also his duty to institute, or to endeavour to institute, proceedings against the promoters, in order to obtain the return of this £10,000 of which the company had been defrauded.

And then it is said that, because he did not communicate to the shareholders the knowledge he had acquired previously to becoming a director, and because he took no steps as a director of the company to institute proceedings against the promoters, he is now to be made liable for this £10,000 under the doctrine of wilful default, which means, I suppose, that he is bound to shew that if proceedings had been instituted soon after December, 1875, when he became a director of the company, those proceedings would not, before the end of 1876, have produced the £10,000. To my mind it is simply unreasonable to suppose it, and it is incredible that that would have been the case.

In the first place, I have never heard that it has been held to be the duty of a director to communicate to his shareholders knowledge acquired by him years before, as to misconduct with reference to the affairs of the company on the part of other persons for which they may be still liable. I know of no reason whatever why he should do so, or of anything which compels a director to disclose to his shareholders his antecedent knowledge even of frauds committed on the company.

I put a case which perhaps may sound ridiculous, but when you have extravagant propositions to deal with, ridiculous illustrations are really not the worst mode of meeting propositions of such a character. Suppose the case of a company dealing with a man for butter, and one of the directors of the company had, three years before he became a director, purchased the butterman's business, and had discovered that that butterman had been in the habit of supplying the company for some years, and had also discovered from the books of his vendor that he had supplied the company with butter at short weight, and had already defrauded the company of £1000—he himself, of course, not continuing the system—would he, under such circumstances, be liable to the company for not disclosing to the shareholders that he had ascertained

that this retired butterman had in this way defrauded the company of £1000, for which he or his estate might be made liable? It would be obviously, to my mind, an extravagant proposition that that director could be made liable for not disclosing the knowledge so acquired by him at so long a period before he became a director of the company.

This however has, of course, no relation whatever to cases where the whole matter forms part of one transaction, and where there has been some arrangement, some juggle by which the parties to a fraud might say, "we will not go on the direction of the company until the fraud is completed," because the Courts are quite strong enough to reach cases of that sort when they arise, but this is a case where the man derived no benefit whatever from the frauds of the promoters. It appears to me that I should not be expounding or applying the law, but that I should be making new law, if I were to hold directors liable for withholding their knowledge from shareholders under such circumstances.

Then is Mr. *Barrett* liable in this case for not taking proceedings? I do not think it is very likely that he would have succeeded at the board in persuading his co-directors to take proceedings at all. I do not think the majority of the board would have concurred with him without the sanction of the shareholders; but even supposing he could have got their concurrence, what would it have amounted to? It appears to me it would still fall within the range of the observations I have already made, and that is, that as there was no obligation upon him to tell his brother directors the knowledge he had, so there was no obligation upon him to initiate by resolution or otherwise any attempt to sue the promoters; because it must be remembered, as I said before, that it is not an admitted debt; if the transaction had occurred some time before, there would have been probably a protracted and very hostile litigation about it, and it by no means follows that at the end of the litigation any money would have been forthcoming any more than there is now; and any discreet or cautious director might very well have said, "It is not wise to take proceedings in this matter; we shall probably not get anything by it, and if we do, it will do the company a great deal of mischief, and we had far better let bygones be bygones."

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I do not think it is for this Court to say that a man is to be made liable simply because he does not choose to sue, or does not take steps to sue under such circumstances.

That being so, I think he is not under any legal liability at all; but even if he were, he could not be considered liable for the whole £10,000; he could only be held liable for what was lost by his not suing. And supposing the company had brought an action in the beginning of 1876, who can tell that the action would have been ended in 1877, when the company went into liquidation? I am satisfied that they would have litigated it to the utmost, and the company would have got into liquidation long before the end of the litigation; so that, even from that point of view, I am not at all satisfied that there was anything really lost by their not suing, and therefore the notion that this gentleman is to be made liable on that ground is entirely unreasonable.

Then the next question is, whether the 165th section of the Act applies to such a case as this? That section provides that "where in the course of the winding-up of any company under this Act it appears that any past or present director, manager, official or other liquidator, or any officer of such company, has misapplied or retained in his own hands, or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company," he may be made liable. Now Mr. *Barrett* is not liable under the first part of the section at all. It was not money in his hands; he is not liable for money of the company, because the money had gone long ago, and, therefore, if he is liable at all, it is for misfeasance or breach of trust in relation to the company, and misfeasance or breach of trust means here either non-communication of his knowledge to the shareholders or not endeavouring to institute proceedings. Then the section provides that "the Court may on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to pay any money so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the

assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just."

Of course, if I had arrived at the opinion that the man was liable as for a breach of trust, I have jurisdiction under that clause to make him pay, but it must be a liability for breach of trust or under the word "misfeasance." But I should be very sorry to hold that under those words I have a summary jurisdiction to inquire whether a man had or had not properly exercised his discretion as a director as to suing or not suing a debtor to the company, even where the debt was not disputed, and *à fortiori* where it is a demand of this kind. I do not think the section, when it talks of "misfeasance or breach of trust in relation to a company," could have been meant to apply to such a case as I have now before me, or that it was intended to enable the Court to say on a summons of this description that it should, after examining into the conduct of an officer of the company, come to the conclusion that there must be negligence on the part of a director in such a case, and that it therefore invests the Court, under those words "misfeasance or breach of trust," with a power to make him pay money to the assets of the company in respect of such a demand.

I do not think myself that the section applies to anything but what I may call fairly plain and ordinary cases of misconduct, and when I use the word "ordinary" I mean ordinary as regards these companies, for many of them are certainly quite extraordinary as regards other transactions, or that it was intended to go beyond what was the settled law on the subject before the statute was passed, so as to make that a case of misfeasance or breach of trust which would not have rendered a man liable as a trustee before the passing of the Act.

The summons as against *Barrett* will be dismissed with costs.

Solicitors: *Wilkins, Blyth, & Fanshawe; Torr & Co.*, agents for *Borlase & Yearsley, Mitcheldean.*

M. R.

1879

Jan. 13.

## LEONINO *v.* LEONINO.

[1878 L. 54.]

*Mortgage—Original Debt and further Advances—Primary and Secondary Securities—Locke King's Act* (17 & 18 *Vict. c.* 113).

13 Ch D 356
16 Ch D 215
223
21 Ch D 587
[illegible]

A testator, a merchant, was in the habit of borrowing money from his bankers from time to time, depositing securities with them upon the occasion of each advance; and on the 29th of March, 1876, his total indebtedness amounted to £62,000, for which his bankers held various stocks and shares as security. On the 30th of March, 1876, the testator applied for a further advance of £15,000, and executed a memorandum by which he charged that sum upon his freehold property at *Caterham*, and agreed that the security was to cover any money due from time to time from him to his bankers. He at the same time deposited the title deeds of the *Caterham* property with his bankers. He received the £15,000, and also further advances on subsequent dates: and he also subsequently deposited with the bankers certain further securities, including the title deeds of freehold and leasehold property, stocks and shares, but no subsequent memorandum was executed.

Some of the stocks and shares were sold by the bankers in the testator's lifetime, and the proceeds applied in reduction of the debt, which at his death stood at £28,625.

It appeared from a memorandum book kept by the testator, and from his ledger, that the successive advances and the successive deposits were treated by him as forming one running account. By his will he devised his *Caterham* property to certain persons, and devised and bequeathed his residuary real and personal estate in trust for sale, and to divide the proceeds, after payment thereout of his debts, among certain other persons:—

*Held*, that the debt due at the testator's death, and the interest thereon from that date, must be borne by the various properties then held by the bankers, rateably, according to their respective values at the death.

*Lipscomb* v. *Lipscomb* (1) and *De Rochefort* v. *Dawes* (2) considered and questioned.

Statement.

### SPECIAL CASE.

*Ippolito Leonino*, a merchant of the city of *London*, by his will, dated the 21st of January, 1875, devised certain freehold property in *Sussex* to his wife, the Defendant *Hannah Leonino*, in fee; and he then devised one portion of his freehold property at *Caterham*, in *Surrey*, to his son, the Plaintiff *Edward Leonino*, in fee, and another portion to another son, the Defendant *Charles Leonino*, in fee. And the testator devised and bequeathed his residuary real and

(1) Law Rep. 7 Eq. 501. (2) Law Rep. 12 Eq. 540.

personal estate to his said sons *Edward* (who afterwards disclaimed) and *Charles* upon trust for sale, and out of the proceeds to pay his funeral and testamentary expenses, debts and legacies, other than specific legacies, and to divide the ultimate residue of such proceeds amongst his children living at his death.

The testator died on the 12th of June, 1877, leaving his said two sons, and two other sons, the Defendants *Arthur* and *Alfred Leonino*, him surviving.

The testator had been in the habit of borrowing money from time to time from his bankers, Messrs. *Robarts, Lubbock, & Co.*, depositing securities with them upon the occasion of each advance, and on the 29th of March, 1876, his total indebtedness to them amounted to £62,000, for which they held various foreign stocks and shares as security.

On the 30th of March, 1876, the testator applied to his bankers for a further advance of £15,000, at the same time depositing with them the title deeds relating to his *Caterham* property, accompanied by the following memorandum signed by him :—

"Gentlemen—In consideration of your advancing to me, at my request, the sum of £15,000 by way of loan to be repaid by me on the 30th of June next, I deposit with you the deeds relating to my property at *Caterham*, in *Surrey*, of about ninety-six acres, value £25,000, as per statement hereon, with full authority for you to dispose of the same when and how you think proper in default of payment of the said loan of £15,000 and interest on the day above stated. And I agree at own expense to concur in such sale, and to perform any act that may be required to effectuate the same, and to make good any deficiency. It is agreed that this security is to cover any moneys due from time to time from me to you, with interest and usual bankers' charges."

The £15,000 mentioned in the memorandum was duly advanced to the testator, not at one time, but by four instalments in the months of March and April, 1876, the first being paid on the 30th of March.

He subsequently received further advances on various dates, receiving back from time to time some of the deposited stocks and shares according as previous advances were partially paid off. On

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the occasions of such further advances he deposited certain additional securities, including, besides other stocks and shares, the title deeds of freehold and leasehold properties; but no subsequent memorandum was executed.

Some of the stocks and shares were sold by the bankers in the testator's lifetime, and the proceeds applied in reduction of the general debt, which at the time of his death stood at £28,625.

It appeared from a memorandum book kept by the testator, and from his ledger, that the successive advances and the successive deposits were treated by him as forming one running account. The entries in the memorandum book shewed how the "loan" stood from time to time and the particulars of the securities deposited, the last entries being as follows:—

"1876. May 17. Loan stands at £40,000.
" " Security recapitulation"—enumerating the securities.
" " June 13. Loan stands at £42,000."

Under these circumstances, the question submitted for the opinion of the Court was, How the said mortgage debt of £28,625 due to Messrs. *Robarts & Co.*, and the interest thereon from the testator's death, ought to be borne as between the several persons entitled under his will to the different parts of his estate.

Argument.

*Chitty*, Q.C., and *Alexander*, for the Plaintiff, and *Carson*, for the Defendant *Charles Leonino*:—

We submit that the whole mortgage debt should, under *Locke King's Act* (17 & 18 Vict. c. 113), be borne rateably by the several properties comprised in the bankers' equitable security. The memorandum of the 30th of March, 1876, was not sufficient to charge the *Caterham* property exclusively with the £15,000 and further advances, for it is evident that the testator intended to treat the whole transaction as one loan and one security.

*Lipscomb* v. *Lipscomb* (1) and *De Rochefort* v. *Dawes* (2) will probably be relied on as authorities that the £15,000 should be exclusively charged on the *Caterham* property, but the circumstances in those cases were different from those here; and in

(1) Law Rep. 7 Eq. 501. (2) Law Rep. 12 Eq. 540.

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*Stringer* v. *Harper* (1), though the debt was held to be primarily charged on the property comprised in the first mortgage, that was because the second estate was charged only "in aid" of the first.

The question is, in reality, one of intention: *Marquis of Bute* v. *Cunynghame* (2); *Gwynne* v. *Edwards* (3). We admit that the direction for payment of debts is not sufficient to shew an intention that the debt should be borne rateably: 30 & 31 Vict. c. 69.

[They were stopped by the Court.]

*Davey*, Q.C., and *W. S. Owen*, for the Defendants *Arthur* and *Alfred Leonino*:—

We submit that the *Caterham* property is the primary security for the £15,000, and that the other properties are the primary security for the further advances. We rely on *Lipscomb* v. *Lipscomb* (4) and *De Rochefort* v. *Dawes* (5). To bring the case within *Locke King's Act*, it must be shewn that the testator intended to charge the several properties *pari passu*; but the intention seems to have been to charge the *Caterham* property primarily with the £15,000.

[They also referred to *Sackville* v. *Smyth* (6) and *Newmarch* v. *Storr* (7), where "debts" were held not to include mortgage debts.]

*W. C. Druce*, for the Defendant *Hannah Leonino*, took the same view.

JESSEL, M.R.:— Judgment.

I must say I have myself not the slightest doubt on this case, and I should hardly have considered it of sufficient importance to give a formal judgment on it, had it not been for the authorities to which I have been referred.

First of all, what is the case? A merchant in *London* borrows money of his bankers, and he gives them security—security in the first instance, on various stocks and shares which, according to our

(1) 26 Beav. 33.
(2) 2 Russ. 275.
(3) Ibid. 289, n.
(4) Law Rep. 7 Eq. 501.
(5) Ibid. 12 Eq. 540.
(6) Ibid. 17 Eq. 153.
(7) 9 Ch. D. 12.

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law, were personal estate. Then, wanting £15,000 more, he gives his bankers a memorandum, by which he says, "I give you some deeds relating to my property at *Caterham*—that is to be the security for the £15,000: in default of payment you may sell; it is agreed this security is to cover the money due from me to you with interest and the usual bankers' charges." Now at that time he owed his bankers on these securities £62,000, and therefore we must read this memorandum with the knowledge of that fact. Consequently the *Caterham* deeds became a security, not merely for the £15,000 proposed to be advanced, but for the £62,000 already due, together with interest, and also all future moneys.

What did he do? He took the £15,000, not in one sum but by instalments, and he afterwards deposited other deeds relating to other estates, both freehold and leasehold, and other stocks and shares, with his bankers. From time to time, as part of the total debt is paid off, he receives back some of the stocks and shares, and from time to time he takes further advances, which again are partially paid off, and so he continues his account, varying the amount from time to time, but without giving his bankers any document beyond the memorandum I have mentioned.

The bankers throughout treated the transaction, as they were entitled to treat it, as one loan, and one security; and as I read the testator's books, he treated it in the same way: he clearly recapitulates the loan as being a loan, for he says, "loan stands at so much," treating it as one consolidated loan, and then at one time he gives a "recapitulation" of the securities. It is clearly one loan and one security. In my opinion, that is the true nature of the transaction; and consequently, looking at what had actually taken place, I hold that the property should bear the debt rateably, there being no contrary intention which the statute requires to be shewn, that the property should bear the burden otherwise than rateably.

With reference to the authorities, they stand in this way. The leading authority on the subject is a case of *Marquis of Bute* v. *Cunynghame* (1). Now what Lord *Eldon* there says is this (2): "If Lord *Bute* had wished that both estates should be equally liable, I do not mean to say that he might not have made them so liable,

(1) 2 Russ. 275. (2) 2 Russ. 299.

or that, as between him and the mortgagee, Lord *Bute* would not have been, as to both, in the situation of a common mortgagor. But may not a man make a mortgage of two estates in such a way, that, though the incumbrancer may go against both or either, yet, if the owner of the equity of redemption shall have created, in the meantime, two different titles to those estates so that they shall go to different persons, the estate, which was the primary security, shall remain the primary security, as between the persons claiming under that mortgagor?" No doubt he may. A man may put an express declaration into the mortgage deed, and I have known it done, for I have done it myself. It is generally a declaration between the legal and personal representative as to how the debt shall be primarily borne; sometimes it is a declaration as between two estates as to how the debt shall be primarily borne. There then is a statement in express terms that one estate shall be the primary security as between the persons entitled to the equity of redemption in that estate and the persons entitled to the equity of redemption in the other estate.

But Lord *Eldon* goes on to consider whether you can effect the same result by inference or implication. Of course you can. If you can do it by express terms, you can do it by implication, or by terms which amount to the same thing as express terms; and Lord *Eldon* winds up by saying (1), "Taking the whole of this transaction together, and without venturing to lay down any general principle, it is my opinion that in this case there is no right to that contribution towards satisfaction of the mortgage which is prayed by the bill;" that is all he decided.

When we come to the subsequent cases, I agree the question is far more difficult. The first is *Lipscomb* v. *Lipscomb* (2), which is very shortly reported. There real estate was mortgaged to secure £1500; and then, by a subsequent deed, this was done: in consideration of the original debt, which was still due, and a further advance of £950, *Lipscomb*, who was the mortgagor, conveyed to *Christmas*, the mortgagee, the original property and other real estate, subject to a proviso for redemption for £2450 and interest; and then by the same deed he gave a further security on some personal estate, including a policy of assurance.

(1) 2 Russ. 300. (2) Law Rep. 7 Eq. 501.

M. R. 1879 LEONINO v. LEONINO. Judgment.

What Vice-Chancellor *Malins* said was this (1): "Mr. *Locke King's Act* does not affect the liability of the properties." And then he says: "The effect of the deed of 1861," that was the second deed, "was to retain the original mortgage security for the £1500, to make that estate subject also to the further charge, and to add to that security (as regards that portion of the debt) the other estate and the policy of assurance." Then he says: "I am of opinion that the estate originally mortgaged remains the primary security for the £1500, and that the £950 must be apportioned upon the land and the policy of assurance rateably."

What does that decision come to. It comes to this, that on the question of construction of the second deed the Vice-Chancellor came to the conclusion that there was a sufficient expression of intention on the part of the mortgagor that the estate should be primarily charged with the £1500 as between the persons claiming under the mortgagor. That is the conclusion the Vice-Chancellor must have come to, according to Lord *Eldon's* decision, which he did not intend to overrule, and could not have overruled. Therefore, the decision comes to a mere question of construction. Not forgetting that Vice-Chancellor *Wickens* agrees with the Vice-Chancellor *Malins* as to the construction in that particular instance, I must say I should have felt great difficulty in arriving at the same conclusion on the mere question of construction. But the question was one of construction, and nothing else. According to the rule to which I have so often referred, as laid down by the House of Lords, where the question is merely one of construction of documents, the mere fact that Judges have come to a conclusion as to the meaning of particular documents before them, does not compel another Judge to arrive at the same conclusion upon other documents differing more or less substantially from those documents.

Therefore, strictly speaking, I am not bound by the decision as a question of construction. I do not require to be bound by the decision as a question of law, because if the Vice-Chancellor is right, that there is this indication of intention sufficiently expressed, that it is to be a primary security as between those claiming under the mortgagor, then the previous decision of Lord *Eldon* had already settled the law.

(1) Law Rep. 7 Eq. 502.

The other case is *De Rochefort* v. *Dawes* (1). There Vice-Chancellor *Wickens*, after expressing an opinion that *Lipscomb* v. *Lipscomb* (2) was well decided—upon which, as I said before, notwithstanding the concurrence of those two Judges, I still have doubts—says it is not distinguishable from the case before him. There, again, it is a question of construction, and the question was whether on a particular letter there was a sufficient expression of intention that certain property, the title-deeds of which were referred to in that letter, should be the secondary security only as between the several persons claiming under the mortgagor. The Vice-Chancellor thought there was. There again, speaking with the greatest possible respect, I have great doubts whether on the question of construction I should have come to the same conclusion. But it is a mere question of construction; and whether I should or should not have come to the same conclusion, it cannot be pretended that both those cases are not very substantially different, as regards the facts, from the case before me; not only as regards the fact of the deposits and the mode in which the deposits were made, but as regards the documents accompanying or shewing the meaning of the deposits.

Therefore, were I clearly of opinion that I should have come to the same conclusion on the construction of the documents in both those cases, it would not prevent me at all from coming to the conclusion I have arrived at in the present instance, that there is no distinction as regards priority of charge between the several persons who claim under the testator, and that the rule apportioning contributions applies to the case of the estates of which he died possessed.

I therefore hold that the £28,625, and the interest thereon from the testator's death, must be borne by the various securities then held by the bankers rateably according to their respective values at the testator's death.

Solicitors: *Emmanuel & Simmonds; Bischoff & Co.*

(1) Law Rep. 12 Eq. 540. (2) Law Rep. 7 Eq. 501.

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## SHARP *v.* LUSH.

[1874 S. 66.]

*Will—"Executorship Expenses"—Executor—Administration Action—Costs—Funeral Expenses—Warehousing Specific Legacies—Debts—Practice—Judge's Chambers—Taking Accounts—Attending Proceedings under Decree—Special Leave.*

The term "executorship expenses" in a will means expenses incident to the proper performance of the duty of an executor, and includes costs incurred by executors in obtaining the advice of solicitors or counsel as to the distribution of their testator's estate; also the costs of the executors and other parties in an action, whether instituted by the executors themselves or by a beneficiary, for the administration of the testator's personal estate; also the testator's funeral expenses; also expenses incurred by the executors for the protection of specific legacies—as, for instance, for warehousing furniture specifically bequeathed—pending the distribution of the assets; and payments by the executors in discharge of debts falling due from the testator's estate after his death—as, for instance, rent due after the testator's death for a house of which he was tenant from year to year.

To entitle a person interested in an administration action to the costs of attending proceedings in Chambers under the decree, he must attend by special leave of the Judge; and if he attends under the common order of course and without special leave, he may be ordered to pay, in addition to his own costs, the extra costs occasioned by his attendance.

Practice as to the mode of taking accounts in administration actions stated.

Statement.

*JOHN ANDREW SHARP*, a partner in the firm of *Sharp & Ullithorne*, solicitors, by his will, dated the 20th of December, 1871, directed that out of the sum which on balancing the accounts of his partnership would be payable to his representatives—and which sum he referred to as his "cash balance"—"any debts owing by him and his several household bills and executorship expenses and probate duty," should first be paid; and the residue of the cash balance he disposed of as follows: one-fourth he gave to his brother, *William Henry Sharp*, the Plaintiff, one other fourth to his clerk, *Richard Bowall*, and the remaining one-half he directed should form part of his general residuary estate.

And after bequeathing numerous pecuniary and specific legacies the testator gave the residue of his estate to his executors therein named, for the benefit of certain persons therein mentioned: and

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he appointed the Plaintiff and Defendants *Lush* and *Overall* his executors.

The testator died in October, 1873.

An action for the administration of the testator's personal estate having been instituted by the Plaintiff "for the benefit of himself and other like persons beneficially interested in the testator's estate," an administration decree was made in March, 1874, directing various accounts and inquiries.

Statement.

By the Chief Clerk's certificate it was found that a sum of £2502 Consols representing the testator's "cash balance" was standing to a separate account in the cause, and that the executors had out of moneys in their hands paid certain amounts for the testator's debts and household bills, and for "executorship expenses" and probate duty.

Under an order made in July, 1878, a sum of £10 16*s.* 6*d.* had been paid to a firm of furniture warehousemen for warehousing specific legacies of furniture pending the realization of the estate, and £13 2*s.* 6*d.* had been paid for a quarter's rent of the testator's residence due at Midsummer, 1874, after his death. The testator being tenant from year to year, the landlord was entitled to and claimed the rent up to that date. These payments were ordered to be made out of certain moneys in Court, but without prejudice to the question by what part of the testator's estate they should be ultimately borne.

The cause now came on upon further consideration, and the question was whether the costs of the action and the payments made under the order of July, 1878, were chargeable on the "cash balance" as being "executorship expenses," or on the general residue.

By an order made in 1875, the conduct of the cause had been given to the Defendant *Lush*, one of the executors.

Argument.

*Chitty*, Q.C., and *W. D. Rawlins*, for *Lush*.

*Waller*, Q.C., and *E. Cutler*, for the Plaintiff, and for the Defendant *Overall*:—

We submit that the costs of the action and the other expenses now in question ought to come out of the general residue. There

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is no case in which "executorship expenses" have been held to include the costs of an administration suit. The term is not so wide as "testamentary expenses," which have been held not to include such costs: *Gilbertson* v. *Gilbertson* (1); *Stringer* v. *Harper* (2); *In re Biel's Estate* (3); *Morgan* and *Davey* on Costs (4); though there are authorities to the contrary: *Harloe* v *Harloe* (5); *Ralph* v. *Carrick* (6).

By "executorship expenses" the testator meant ordinary costs, charges, and expenses not being costs of suit. The term should be confined to the expenses of passing the executor's accounts and of ascertaining the assets, and therefore cannot include either the costs of this action or the other two items, and, apparently, not even funeral expenses.

Moreover, this is not, in form, a suit by executors seeking the opinion of the Court as to how the estate should be administered. It was instituted by the Plaintiff as a beneficiary under the will.

*Ince*, Q.C., and *Badnall*, for the legatee *Bowall*, took the same view.

*Davey*, Q.C., and *Ingle Joyce*, for the residuary legatees, referred to *Miles* v. *Harrison* (7).

[JESSEL, M.R., referred to *Williams* on Executors (8) upon the question of an executor's liability for his testator's funeral expenses.]

Judgment.

JESSEL, M.R.:—

I cannot distinguish between "executorship expenses" and "testamentary expenses." As I understand the words "executorship expenses," they are expenses incident to the proper performance of the duty of the executor in the same way as testamentary expenses are, neither more nor less.

Now what is the proper performance of the duty of an executor? It is ascertaining the debts and liabilities due from the testator's

(1) 34 Beav. 354.
(2) 26 Beav. 585.
(3) Law Rep. 16 Eq. 577.
(4) Page 115.
(5) Law Rep. 20 Eq. 471.
(6) 5 Ch. D. 984, 998.
(7) Law Rep. 9 Ch. 316, 323.
(8) 7th Ed. pp. 1788, 1789.

estate, the payment of such debts and liabilities, and the legal and proper distribution of the estate among the persons entitled.

It has been held that if the executor is unable to decide these questions for himself he may obtain the assistance of a Court of Equity to decide them for him, and the costs occasioned by the suit instituted by him for that purpose will be allowed to him—that is, not only his own costs but the costs of the other parties to the suit.

Again, it has been held that it makes no difference as regards the incidence of the costs, that instead of the executor coming as Plaintiff to ask for the direction of the Court, one of the beneficiaries comes and asks for the same direction in a proper case. In that case also the administration costs—that is, the costs of the suit—are borne in the same way as if the executor himself paid them. I mention that because, although in the case before me one of the executors is Plaintiff, he filed his bill in the character of a beneficiary; but I do not consider that as creating a distinction.

That being so, when a testator directs "executorship expenses" to be paid out of a given fund he does, in my opinion, include the expenses incurred in relation to the administration of his estate, whether incurred in an administration suit, or whether incurred simply by taking the advice of a solicitor and counsel outside the administration suit as to the distribution of the estate. It very often is cheaper to take the opinion of the Court than even the opinion of counsel. I cannot see any solid distinction; and I think therefore, whatever this testator may have intended, he has used words which clearly cover the whole costs of the administration. When I say "whatever he may have intended," I do not forget he was a lawyer; he must very often have received and seen charges and expenses payable to executors, and must have known they included the costs of a Chancery suit.

But, in addition, there is this difficulty in the way of those who argue in favour of the opposite view. They cannot fairly contend the executor's own costs of the administration suit are not to be paid, if they are costs which he is liable to pay. It seems to me whether one looks at the fair meaning of the words or the authorities the result is the same.

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Now as regards the authorities, they are fairly summed up in that case to which I have been referred of *Harloe* v. *Harloe* (1), the decision of Vice-Chancellor *Hall;* and I think he puts it there on the right footing, that the administration costs are included under the general words "testamentary expenses."

As I understand it, that was the ground taken by the Lord Chancellor in *Miles* v. *Harrison* (2), because it was argued, and he assented to the argument, that the whole costs of the administration are testamentary expenses. Certainly, if they are the costs of the administration, or the costs of the administrator—whether he is called administrator or executor—I am of opinion that those costs must be paid.

As regards the funeral expenses, there again the law is in a very peculiar state; but, as is laid down in the passage I have already read from Mr. Justice *Williams'* book, it appears to me that the executor is liable to pay the funeral expenses even without an order on his part, if he has any assets available for the purpose; and it has also been decided that the funeral expenses are a first charge on the assets. Even if the executor never receives assets to the amount of the funeral expenses, he is liable to pay, although he did not order the funeral. It is part of his official duty to bury the deceased, so that he is liable to pay the funeral expenses without an order; they are clearly executorship expenses.

As regards the rent, I must say the quarter's rent was a debt of the testator. He was tenant from year to year; and it was the last quarter's rent. No doubt, it accrued due after his death; but it was a debt due from his estate for which the executors might have been sued.

The remaining item is for warehousing specific legacies. It is the duty of the executor, as such, to take care of specific legacies. It is his duty, as such, not to assent to the payment of them until he ascertains there are sufficient assets; therefore it must be a duty incident to his office to take care of them during the intervening period.

I am of opinion, therefore, that the expense incurred for warehousing these legacies is an expense incident to the office of the executor, and therefore is an "executorship expense."

(1) Law Rep. 20 Eq. 471. (2) Law Rep. 9 Ch. 316, 323.

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*Ince*, Q.C., for the legatee *Bowall*, who had attended proceedings in Chambers under the common order of course giving leave to attend, and

*Davey*, Q.C., for the residuary legatees, some of whom were infants, who had also attended (as to the infants by their guardian *ad litem*) under a similar order, asked for their costs of their present appearance, and also for their costs of attendance in Chambers.

JESSEL, M.R. :—

Judgment.

You are all entitled to appear to-day, because there was a question to be argued; I shall therefore give you the costs of this appearance.

But as to the costs of attending the proceedings in Chambers, there ought to be no mistake about the practice, as it is a matter of the greatest importance. If I were to accede to this application I should waste half of the estates which are administered before me in this Court.

The law stands in this way, that any persons interested who ought to be served can, under the general practice, attend, as of course, the proceedings; but that does not entitle them to the costs of attending. That is determined by the Judge in Chambers, who, under a general order (1), decides what parties interested in the estate shall attend the taking of the accounts at the cost of the estate; that is the subject of a special application. I cannot prevent anybody attending the proceedings; if there were fifty people I could not prevent them instructing fifty solicitors to attend all the proceedings; but if they did, they would not only pay their own costs where I found forty-eight of them unnecessary, but I should make them pay the extra costs occasioned by attending unnecessarily. That has always been the practice in my Chambers since I have had the honour of sitting here (2).

I do not believe these numerous attendances in Chambers on taking the accounts, and so on, are of the slightest use. According to my experience, when you have one respectable solicitor taking

(1) Cons. Ord. xxxv., r. 16.

(2) See Cons. Ord. xl., rr. 28, 32; Additional Rules of Court, 1875, r. 21.

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the accounts adversely on one side, and you have an equally respectable solicitor attending on the other side, the attendance of all other solicitors and clerks is so much money wasted.

As a rule, I give leave to one solicitor to attend on one side and one solicitor on the other. When the residuary legatees come in, what I do is this: I let one solicitor take the accounts for the residuary legatee on the one side, and one solicitor take the accounts for the executors on the other. In the present case, as neither Mr. *Ince's* nor Mr. *Davey's* clients obtained special leave to attend the proceedings in Chambers, and as I am not satisfied that their attendances were necessary, I shall not give them the costs of those attendances.

Solicitors: *Bolton, Robbins, & Busk; Monckton, Long, & Co.; R. J. Villiers; J. & M. Pontifex.*

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M. R. 1879 Jan. 25.

## BENNET *v.* BENNET.

[1876 B. 9.]

*Parent and Child—Loco Parentis—Widowed Mother—Advancement—Presumption.*

There is no such obligation, according to the rules of equity, on a mother to advance or make a provision for her child, as in the case of a father; and therefore, when a mother makes a purchase or investment in the name of her child, or in the joint names of herself and her child, that does not of itself afford the presumption of advancement: in such a case the intention to advance is a question of evidence.

A sum of money borrowed by a widowed mother for her son's benefit, *held*, upon the evidence, to be, not a gift, but a loan from the mother to the son provable by her against his estate on his death.

The doctrine of presumption of advancement explained.

*Sayre* v. *Hughes* (1) considered.

Statement.

### ADJOURNED SUMMONS.

The action was for the administration of the estate of *Philip Bennet*, deceased, and this was a summons taken out by his mother, *Ann Bennet*, widow, by which she claimed to be a creditor

(1) Law Rep. 5 Eq. 376.

upon the estate for the sum of £3000 alleged to have been advanced by her to him, together with interest; she holding no security whatever for the amount.

It was not denied that the son had received the £3000, but the question was whether it was a gift to him from his mother, or merely a loan. The circumstances, as stated by the mother in her affidavit in support of her claim, were as follows:—

After the death of Mrs. *Bennet's* husband, which took place in August, 1866, it was found necessary to raise money to discharge certain of his liabilities, and as the amount of capital required was so large that the interest payable would have materially reduced her son's income, which was derived from a settled freehold estate upon which the charge was to be made, an arrangement was come to between the mother and son, by which, in order to relieve the son to a certain extent from the payment of the interest on the amount of the charge, the mother consented to her jointure of £1000 per annum, to which the estate was liable under her marriage settlement, being reduced to £600 per annum; and, in lieu of the remaining £400 per annum, she was to have the use of a house upon the estate, and of the furniture, rent free. This arrangement was accordingly carried into effect.

In the year 1868, the son desiring to raise a sum of £3000, and having no sufficient security of his own to offer, requested his mother to effect an insurance for £3000 upon her life, and to borrow that amount upon the security of the policy and a mortgage of her jointure, he promising to pay the premiums and the interest on the loan.

Accordingly, the mother insured her life for £3000, and then, on the 1st of January, 1869, mortgaged the policy and her £1000 jointure to the insurance office as security for £3000 and interest at 5 per cent.

The whole of the £3000 so raised was paid over to the son, no part of it being received by the mother; and during his life the interest and premiums, amounting to about £420, were always paid by the son, his mother continuing to receive her reduced jointure of £600 per annum, and to have a residence rent free, according to the terms of the original arrangement. The mother expressly stated that, save that she was willing to help her son in

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his difficulties, she never regarded the raising of the £3000 otherwise than as by way of loan from her to him.

The son was married and had a separate establishment of his own. He died on the 1st of July, 1875, insolvent, and since that period the mother had paid the premiums on the policy and the interest on the £3000 loan. She now claimed to be a creditor upon the estate for the £3000, together with interest at 5 per cent. from her son's death.

Argument.

*Herbert Lake*, for the claim:—

The doctrine of advancement by a parent to a child does not apply to such a case as this. It is clear from the circumstances that the £3000 was intended to be a loan to the son, not a gift.

[He was stopped by the Court.]

*H. A. Giffard*, for a creditor who had obtained conduct of the proceedings in the action:—

The presumption of advancement arises as between a widowed mother and her child, just as much as in the case of a father: *Lewin* on Trusts (1); *Sayre* v. *Hughes* (2), where *Re De Visme* (3), which is apparently a decision to the contrary, is commented on. The presumption arises from the nature of the relationship, and therefore parol evidence on the part of the mother against the presumption may be disregarded, though that is not so in the case of a stranger.

I do not set up the defence of the *Statute of Limitations*, as the mother virtually paid £400 per annum as interest for the son's benefit.

Judgment.

JESSEL, M.R.:—

The first question is, what is the law upon the subject; for I must say I am very much embarrassed by the authorities.

The doctrine of equity as regards presumption of gifts is this, that where one person stands in such a relation to another that there is an obligation on that person to make a provision for the other, and we find either a purchase or investment in the name of

(1) 6th Ed. p. 158. (2) Law Rep. 5 Eq. 376, 381.
(3) 2 D. J. & S. 17.

the other, or in the joint names of the person and the other, of an amount which would constitute a provision for the other, the presumption arises of an intention on the part of the person to discharge the obligation to the other; and therefore, in the absence of evidence to the contrary, that purchase or investment is held to be in itself evidence of a gift.

In other words, the presumption of gift arises from the moral obligation to give.

That reconciles all the cases upon the subject but one, because nothing is better established than this, that as regards a child, a person not the father of the child may put himself in the position of one *in loco parentis* to the child, and so incur the obligation to make a provision for the child.

Now what is the meaning of the expression "a person *in loco parentis*"?

I cannot do better than refer to the definition of it given by Lord *Eldon* in *Ex parte Pye* (1), referred to and approved of by Lord *Cottenham* in *Powys* v. *Mansfield* (2). Lord *Eldon* says it is a person "meaning to put himself *in loco parentis*; in the situation of the person described as the lawful father of the child." Upon that Lord *Cottenham* observes, "but this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any of such offices or duties by one not the father, to infer an intention of such person to assume also the duty of providing for the child."

So that a person *in loco parentis* means a person taking upon himself the duty of a father of a child to make a provision for that child. It is clear that in that case the presumption can only arise from the obligation, and therefore in that case the doctrine can only have reference to the obligation of a father to provide for his child, and nothing else.

But the father is under that obligation from the mere fact of his

(1) 18 Ves. 140. (2) 3 My. & Cr. 359, 367.

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being the father, and therefore no evidence is necessary to shew the obligation to provide for his child, because that is part of his duty. In the case of a father, you have only to prove the fact that he is the father, and when you have done that the obligation at once arises; but in the case of a person *in loco parentis* you must prove that he took upon himself the obligation.

But in our law there is no moral legal obligation—I do not know how to express it more shortly—no obligation according to the rules of equity—on a mother to provide for her child: there is no such obligation as a Court of Equity recognises as such.

From *Holt* v. *Frederick* (1) downwards it has been held that no such obligation exists on the part of a mother; and therefore, when a mother makes an advancement to her child, that is not of itself sufficient to afford the presumption in law that it is a gift, because equity does not presume an obligation which does not exist.

But there is a decision of Vice-Chancellor *Stuart* to the contrary in *Sayre* v. *Hughes* (2), decided in 1868, although there was a prior decision of the Court of Appeal in *Re De Visme* (3), in which the law was assumed to be as I have stated it. The latter was a case of a married woman living separate from her husband. While living separate she invested the savings of her separate estate in the joint names of her son and daughter. She died, appointing her daughter her executrix. The son having become a lunatic, the daughter presented a petition for the transfer of the fund to herself as executrix. The petition was unopposed, and the counsel for the Petitioner said this: "In *Re Collinson* (4), where a father had made investments in the name of his son, Lord *Cranworth*, though he held them not to be intended as an advancement, declined to act upon that view without a bill being filed. I submit, however, that such a course is not necessary here, there being no presumption that a purchase by a mother in the name of a child is intended for an advancement, though such a presumption does arise where the purchase is made by a father."

Upon that their Lordships made the order, that is to say, they made it because the presumption could not exist in the case of a

(1) 2 P. Wms. 357.
(2) Law Rep. 5 Eq. 376.
(3) 2 D. J. & S. 17.
(4) 3 D. M. & G. 409.

mother, and therefore there was no occasion for a suit to inquire whether such a presumption was rebutted. That, therefore, was a decision in 1863 that in the case of a mother no such presumption exists as in the case of a father.

In *Sayre* v. *Hughes* (1) the Vice-Chancellor says this (2): "It has been argued that a mother is not a person bound to make an advancement to her child, and that a widowed mother is not a person standing in such a relation to her child as to raise a presumption that in a transaction of this kind a benefit was intended for the child. But the case of a stranger who stands *in loco parentis* seems not so strong as that of a mother."

That is not the question: there is no rule upon the point of strength, but the question is one of equitable obligation.

Then the Vice-Chancellor proceeds: "In the case of *Re De Visme* (3) it was said that a mother does not stand in such a relationship to a child as to raise a presumption of benefit for the child. The question in that case arose on a petition in lunacy, and it seems to have been taken for granted that no presumption of benefit arises in the case of a mother. But maternal affection, as a motive of bounty, is, perhaps, the strongest of all, although the duty is not so strong as in the case of a father, inasmuch as it is the duty of a father to advance his child. That, however, is a moral obligation, not a legal one."

That is not quite right: it is a moral obligation known to Courts of Equity. All the Court of Appeal decided was that there was no such moral obligation in the case of a mother as the Court could take notice of as such.

That being so, the argument of the Vice-Chancellor falls to the ground. The only question in such cases is whether the presumption is a presumption of law.

I may say I should have had no hesitation in deciding *Sayre* v. *Hughes* in the same way as the Vice-Chancellor did, having regard to the evidence; though I should not have arrived at the same conclusion irrespective of the evidence.

We then arrive at this conclusion, that in the case of a mother —this is the case of a widowed mother—it is easier to prove a

(1) Law Rep. 5 Eq. 376. (2) Law Rep. 5 Eq. 381.
(3) 2 D. J. & S. 17.

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gift than in the case of a stranger: in the case of a mother very little evidence beyond the relationship is wanted, there being very little additional motive required to induce a mother to make a gift to her child.

In the present case there is strong evidence to shew that this was intended to be a loan and nothing else.

The circumstances, stating them shortly, are these:—

A mother, a widowed mother, has a jointure of £1000 a year. By an arrangement with her son, who was entitled to the income of the estate on which the jointure was charged, she agreed to accept a reduced jointure of £600 a year, in return for which she was to have the use of a house rent free. The son then, being in difficulties, wanted £3000. As he could not get it himself on his own security, his mother applied to an insurance office to lend her the money, which the office agreed to do on a mortgage of her jointure and of a policy on her life. The money was then borrowed from the office on that security, and handed over to the son, who himself paid the premiums on the policy and the interest on the £3000 during his life.

Unfortunately for the mother, the son died in her lifetime insolvent, whereupon the office called upon her to pay the premiums; under these circumstances she now claims to prove the £3000 against the son's estate.

When you look at it, this is as little like a gift as possible. The object of the mother in entering into this obligation to the office was to provide for the repayment of this money, which was borrowed for the benefit of the son; and no doubt it was anticipated that the obligation would be discharged upon the very probable event of the mother's death in the son's lifetime, when the office would be repaid out of the policy money in the usual way. Therefore, when it is said that this was in reality a gift by the mother, that is not in accordance with the actual facts of the case. Here you have a transaction which in its inception was a loan to the mother to enable her to afford temporary assistance to her son. It appears to me that it has every characteristic of a loan and not of a gift, and that I cannot accept the argument that it was a gift.

I am, therefore, of opinion that the presumption that this was

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a gift does not exist, and therefore that the mother is entitled to prove for the £3000 against the son's estate.

As the son paid interest on the sum at 5 per cent. as fixed by the mortgage deed, there is sufficient evidence of a contract to pay 5 per cent.; the mother is therefore entitled to prove for interest at that rate.

Solicitors: *Lake, Beaumont, & Lake; W. & A. Ranken Ford.*

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## *Ex parte* MERCERS' COMPANY.

M. R.
1879
Jan. 25.

*Practice—Costs—Discretionary Power of Court—Judicature Act*, 1875—*Rules of Court*, 1875, *Order* LV.—*Repeal of prior Statutory Enactments—General Metropolitan Paving Act*, 1817 (57 *Geo.* 3, *c. xxix.*)—*Purchase of Lands—Purchase-money—Petition for Payment out—Parties entitled to Rent-charges otherwise secured—Service.*

It is now immaterial to consider whether any public or private statute passed prior to the *Judicature Act*, 1875, has made or omitted to make any express provision as to the costs of particular proceedings under any such statute, inasmuch as the combined effect of the *Judicature Act*, and Order LV. of the Rules of Court, 1875, giving the Judges of the High Court of Justice a discretion as to costs in all cases, with certain exceptions specified in the Order, is to repeal all previous enactments directing costs to follow certain rules: *Garnett* v. *Bradley* (1); and, where a previous statute is silent as to the costs of particular proceedings under it, to supply the omission.

Where a petition was presented for payment out of Court of purchase-money paid in in respect of real estate purchased under the *General Metropolitan Paving Act* (57 Geo. 3, c. xxix.), service of the petition upon parties entitled to certain small rent-charges charged on the property purchased, but which were amply secured on other property not included in the purchase, was held to be unnecessary.

Statement.

THIS was a petition by the *Mercers' Company* for payment out of Court of a sum of £22,000, being the purchase-money in respect of certain property in *Cheapside* belonging to them and taken by the Commissioners of Sewers of the City of *London* under the *General Metropolitan Paving Act*, 1817 (57 Geo. 3, c. xxix.).

The agreement between the *Mercers' Company* and the Commis-

(1) 3 App. Cas. 944.

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sioners for the sale of the property provided that the Commissioners should pay to the company "their costs of and incidental to the same agreement, and of carrying the same into effect; such costs, in case of difference, to be settled by *E. J. Reed*, Esq."

The petition asked that the Commissioners might be ordered to pay costs, as between solicitor and client, "of and incidental to the said agreement and this petition, and of the order to be made thereon and all proceedings relating thereto, to be settled, in case of difference, as provided by the said agreement."

Argument.

*Blakesley*, for the Petitioners, submitted that the costs of the petition were covered by the agreement, or at all events by sect. 89 of the above Act: *In re Saunders' Estate* (1).

[JESSEL, M.R.:—I have recently commented on that decision with disapproval in *In re Merceron* (2), where I pointed out that the Act is silent as to the costs of a petition for payment out of purchase-money.]

[*Millar, am. cur.*, mentioned *In re Gould* (3).]

*Lesingham Bailey*, for the Commissioners, submitted that the agreement only comprised conveyancing costs, and that the costs of the petition should be taxed by the Taxing Master in the usual way rather than by a person not conversant with the subject.

Judgment.

JESSEL, M.R.:—

This case raises an important question, namely, whether, independently of any Act of Parliament by which express provision is made or omitted to be made for the costs of any particular proceedings in the Court of Chancery—now the Chancery Division of the High Court of Justice—the Court can exercise its discretion as to those costs.

It appears to me that the question has practically been decided by the House of Lords in the recent case of *Garnett* v. *Bradley* (4), where it was held that the effect of the *Judicature Act*, 1875, which gives the High Court a discretion as to costs, was to repeal all previous Acts which directed costs to follow certain rules without

(1) Law Rep. 8 Eq. 681.
(2) 7 Ch. D. 184.
(3) 24 Beav. 442.
(4) 3 App. Cas. 944.

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leaving the Court a discretion. Lord *Blackburn* there observes that according to the Common Law a party to an action had, originally, no right to costs at all; costs in Courts of Common Law were the creation of statute and nothing but statute, and all the statutes, whether private or public, giving a right to costs, are now repealed by the *Judicature Act*, and the Judges of the High Court of Justice may, under Order LV. of the Rules of Court, 1875, which must be dealt with as part of the Act, exercise their judicial discretion as to costs in all cases, with certain exceptions.

In this case the *Metropolitan Paving Act* contains no provision for the costs of a petition for payment out of purchase-money, but the *Judicature Act* supplies the omission by giving the Court a general discretion in all cases as to costs. Accordingly, in the exercise of that discretion, I direct that the costs of this petition be taxed by the Taxing Master and not by Mr. *Reed*.

Part of the property taken by the Commissioners was subject together with other property affording by itself ample security, to two small rent-charges of £8 and £2 per annum.

The parties entitled to these rent-charges had not been served with the petition.

JESSEL, M.R., held that service on these parties was unnecessary.

Solicitors: *C. T. Lane; A. J. Baylis.*

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1879

Feb. 3.

## *In re* CAPON'S TRUSTS.

*Power of Appointment — Non-exclusive — Appointment to "Survivors" of Objects—Illusory Appointment*—11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 46.

An appointment since the *Illusory Appointments Act* (11 Geo. 4 & 1 Will. 4, c. 46), under a non-exclusive power, of an entire fund unto and amongst the objects "and the survivors and survivor of them, and if only one should survive, then unto that one":—

*Held* valid.

*Dictum* in *Minchin* v. *Minchin* (1) disapproved of.

Statement.

BY the marriage settlement of Mr. and Mrs. *Tuson*, dated in 1813, a legacy to which the wife was entitled under the will of her grandfather, *John Capon*, deceased, was assigned to trustees upon trust, after the deaths of the husband and wife, to pay the trust fund "unto or between or amongst all and every the child and children of the marriage, in such parts and proportions, manner and form, as the survivor" of the husband and wife should by deed, with or without power of revocation, appoint; and in default of appointment, to the children of the marriage in equal shares.

The wife survived the husband, and by a deed-poll, dated in 1834, irrevocably appointed the trust fund, from and after her decease, unto and amongst the only three children of the marriage (naming them) "and the survivors and survivor of them equally, share and share alike, and if only one of them should survive her (the wife), then unto that one only."

The wife died in 1878, leaving only two of the children her surviving, the third, a married daughter, having died in her lifetime.

The trust fund having been paid into Court by the trustees of the settlement, under the *Trustee Relief Act*, a petition was now presented by the two surviving children, asking that the fund might be paid out to them.

The question was whether the appointment was a valid exercise of the power.

(1) 3 Ir. Ch. Rep. 167.

*Freeling*, for the Petitioners:—

Argument.

I submit that, although the power was in terms non-exclusive, an appointment to the "survivors" of the objects was good.

The only authority against this view is a *dictum* of the Master of the Rolls in *Ireland* in *Minchin* v. *Minchin* (1) to the effect that an appointment under a non-exclusive power to all or some of the objects, with a gift over, in case any of them should die under age or before marriage under age, of the share to the other objects, is not valid under the *Illusory Appointments Act* (11 Geo. 4 & 1 Will. 4, c. 46). But in reference to that *dictum* Lord *St. Leonards* says (2): "It was not necessary to decide this point, and it seems to require further consideration."

Here none of the objects were excluded by the appointment; they each took an interest—a substantial interest, even though contingent only.

*Badcock*, for the representatives of the deceased child, relied on *Minchin* v. *Minchin*, and submitted that the trusts of the settlement took effect as in default of appointment.

JESSEL, M.R.:—

Judgment.

In my opinion this *dictum* of the Master of the Rolls in *Ireland* is not good law.

In the present case the power was as follows:—[His Lordship read it.] Then the wife, by an irrevocable deed, *bonâ fide* appoints the fund amongst all her children in this way:—[His Lordship read the deed of appointment.] This then was an appointment to all the children with an ultimate gift over to the survivor.

One of the children, a married daughter, died in her mother's lifetime, and consequently she took nothing; but nevertheless when living she had, under that irrevocable appointment, a contingent interest, a saleable interest, an interest worth an appreciable sum of money.

This was after the passing of the *Illusory Appointments Act* (11 Geo. 4 & 1 Will. 4, c. 46), which recited that "Whereas, by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects, in such manner

(1) 3 Ir. Ch. Rep. 167. (2) *Sugden* on Powers, 8th Ed. p. 450.

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that none of the objects can be excluded by the donee of the power from a share of such property; and whereas appointments in exercise of such powers whereby an unsubstantial, illusory, or nominal share of the property affected thereby is appointed to or left unappointed to devolve upon any one or more of the objects thereof, are invalid in equity, although the like appointments are good and binding at law;" and it therefore enacted "that no appointment which from and after the passing of this Act shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power."

Now my opinion is that this appointment was something more than "unsubstantial, illusory, or nominal"; it was intended to be real; it is at least an "illusory" appointment, that is, an appointment which looks like an appointment but gives the appointee nothing—for that is the meaning of an "illusory" appointment; an appointment that "makes game of"—that gives in name only.

What the Act meant by an "unsubstantial, illusory, or nominal" appointment was an appointment that had the mere shadow or appearance of an appointment; and as to such appointments it says they shall be valid in equity as well as at law. So that, assuming this was an illusory appointment, it was valid under the Act at all events; but in my opinion it was something more than an illusory appointment.

I therefore hold this to be a valid appointment, and accordingly the order will be as prayed.

Solicitors: *Crowder, Anstie, & Vizard.*

## *In re* STORFORTH LANE COLLIERY COMPANY.

M. R.
1879
Feb. 10.

*Winding-up—Priority of Petition—Advertisement in London Gazette—Person entitled to Carriage of Order.*

When a winding-up order is made upon two petitions, the advertisements of which appear in the same number of the *London Gazette*, the petitioner whose petition has been first presented is entitled to the carriage of the order.

Statement.

IN this case an order was made for the winding-up of the above company upon two petitions by creditors, and the question arose as to which of the two petitioners was entitled to the carriage of the order.

The first petition was presented by *C. Black* on the 15th of January, 1879, and the second petition by *E. Tillyard* on the following day.

Both petitions were advertised in the *London Gazette* of the 17th of January, 1879, but *Tillyard's* petition appeared in an earlier page of the *Gazette* than *Black's*.

Argument.

*Brett*, for *Tillyard*, contended that he was entitled to the carriage of the order as his petition was in an earlier page of the *London Gazette* than *Black's*, and priority in the advertisement, not priority in the presentation of the petition, determined the right of a petitioner to the carriage of the order: *In re United Ports and General Assurance Company* (1); *In re Trades Bank Company* (before the Master of the Rolls on Dec. 8, 1878). He also referred to *In re Merrybent and Darlington Railway Company* (mentioned in *Buckley* on the Companies Acts (2)), where two petitions had been presented on the same day, and advertised in the same number of the *Gazette*, and the Master of the Rolls gave the carriage of the order to the petitioner whose petition stood first in the *Gazette*.

*Davey*, Q.C., and *H. B. Buckley*, for the Petitioner *Black*, contended that the case of *In re Merrybent and Darlington Railway*

(1) 39 L. J. (Ch.) 146. (2) 3rd Ed. p. 471.

M. R. 1879

*In re* Storforth Lane Colliery Company.

*Company* did not apply, as here, though the advertisements were in the same *Gazette*, yet *Black's* petition was presented before the other.

*Chitty*, Q.C., and *Frederick Thompson*, for the company.

*Farwell*, and *Russell*, for other parties.

Judgment.

Jessel, M.R., held that, as between two petitioners whose advertisements appeared in the same number of the *London Gazette*, the one whose petition was presented first was entitled to the carriage of the order.

Solicitors: *E. Tillyard; Chester & Co; Simpson & Cullingford; Poole & Hughes.*

## *In re* LANDORE SIEMENS STEEL COMPANY.

V.-C. M.
1879
Jan. 24.

*Winding-up—Transferring Action—Ex parte Application—Rules of Court, 1875, Order LI., r. 2a.*

When an order for the compulsory winding-up of a company has been made, an action against the company pending in another Division of the Court will be transferred on an application *ex parte*.

IN this case an order had been made by Vice-Chancellor *Malins* for the compulsory winding-up of the company, certain debenture holders and the trustees of a debenture deed appearing and supporting the petition.

*Higgins*, Q.C., and *Shebbeare*, then moved *ex parte*, under Rules of Court, 1875, Order LI., rule 2a, that an action which had been brought before the Master of the Rolls by these debenture holders for the administration of the debenture deed might be transferred to this Court. They referred to *Buckley* on the Companies Acts (1).

HIS LORDSHIP acceded to the application, and made an order for the transfer of the action.

Solicitors: *Phelps & Woodforde.*

(1) 3rd Ed. p. 201.

V.-C. M.
1879
Jan. 31.

## *In re* PEACOCK'S TRUSTS.

*East India Company's Trust Fund—Widow's Pension—Separate Use—Second Husband.*

1 Ch D 196

Under a trust deed for providing pensions for the widows and children of clerks in the *East India Company's* service the petitioner became entitled to a widow's pension. She married a second husband, who claimed to be entitled to the pension in his marital right. The trust deed provided that the pension should be paid for the maintenance of widows and children, and that any recipient of a pension who should dispose of or incumber it should lose all right to such pension. It was obligatory on the clerks in the Company's service to contribute to this fund :—

*Held*, that the pension provided for the petitioner was intended by the trust deed to be for her separate use, and the money was ordered to be paid to her upon her sole receipt.

Statement.

A FUND for the benefit of the widows and families of deceased officers and clerks of the *East India Company's* Regular Home Establishment, commonly called "*The Regular Widows Fund*," was established by deed dated the 1st day of March, 1820, and made between certain officers of the *East India Company* therein named of the one part, and the *East India Company* of the other part. Under the provisions of that deed pensions were payable to the widows of officers on the home establishment of the late *East India Company*, who had been subscribers to the fund varying in amount according to the number of years the deceased officer might have been in the establishment. The pension continued during life, but the deed contained no express provision that in the event of the future marriage of an incumbent on the fund her pension should be payable on her separate receipt.

In the year 1867 a pension of £130 per annum from the said fund was granted to the Petitioner as the widow of Mr. *Edward Gryffydh Peacock*, a subscriber to the fund, and a clerk on the *East India Company's* Regular Home Establishment.

In the month of May, 1869, the Petitioner married *George Edward Steward*, but differences subsequently arose between them, and they were now living apart. Subsequently to the marriage, and up to Christmas, 1873, the pension payable to the Petitioner was paid upon the joint receipt of *George Edward*

*Steward* and the Petitioner. Since Christmas, 1873, the payment thereof had been withheld by reason of the disagreement between the Petitioner and *George Edward Steward*, and the consequent objection on the part of each of them that the other should receive the pension.

The amount payable in respect of the arrears of such pension calculated up to the 25th of March, 1878, after deducting income tax, was £546 13*s.* 11*d.*

That sum was separately claimed by *G. E. Steward* and the Petitioner respectively, and under these circumstances the trustees of the fund paid the sum of £541 6*s.* cash into Court, being the arrears of the pension after deducting therefrom the costs of paying the trust fund into Court.

No settlement or agreement for a settlement whatsoever was made before or upon or had been made since the marriage of the Petitioner and *G. E. Steward*. Since their separation the Petitioner had been supported by her only son; *G. E. Steward* had not contributed anything towards her maintenance and support.

The Petitioner had no other source of income than that afforded by the pension.

The Petitioner claimed to be entitled to the above pension and the arrears thereof for her separate benefit, or to have the same settled and secured to her by this Court.

The trust deed under which the pension was payable contained the following rules:—

"Rule 12. That although the object of this fund is mainly intended to provide a comfortable maintenance for the widows, and a suitable education for the children, of those officers and clerks who belong to the Regular Home Establishment of the *East India Company*, as being the ties naturally most dear, yet as the fund will be materially supported by the contributions of many who are strangers to those most endearing ties, therefore in all cases where the officers or clerks dying shall leave neither widow nor child to participate in the benefit of the fund, but shall have left a father, a widowed mother, or widowed or unmarried sisters, who are wholly or in great part dependent on them for support, it shall be in the discretion of the trustees to allot in such portions as they shall think fit, to such father or widowed mother, or

V.-C. M. 1879 — *In re* PEACOCK'S TRUSTS. — Statement.

widowed or unmarried sisters, an allowance out of the fund, not exceeding altogether the portion that would have been claimed by the widow of such officer, if he had left one; but in no case shall any allowance be made out of this fund to any other relatives than those above specified.

"Rule 13. That the pensions to be granted pursuant to the foregoing plan shall in no case whatever be saleable, or assignable, or be sold, charged, or disposed of directly or indirectly; and that if any person whatever who may become entitled to any such pension, shall sell, assign, charge, or mortgage, or otherwise dispose of it, either directly or indirectly, such person shall forthwith forfeit it, and lose all right to participate in the fund; and the pension so assigned, sold, charged, or mortgaged, shall immediately and entirely cease, and the party to whom it may be assigned, sold, charged, or mortgaged, shall have no interest in it whatever."

Argument.

*Glasse*, Q.C., and *Badnall*, in support of the petition:—

The terms of the trust deed, under which the Petitioner claims this fund, shew distinctly that it was intended to be for the separate use of any widow receiving a pension under it. No particular form of expression is required in order to create a separate estate in favour of the wife to the exclusion of the marital right: *Stanton* v. *Hall* (1); *Moore* v. *Morris* (2). The intention may be inferred from the nature of the provisions, as where the direction is that the property shall be at the wife's own disposal, as in *Pritchard* v. *Ames* (3), or for her livelihood, as in *Darley* v. *Darley* (4); *Massy* v. *Rowen* (5). It is provided by the rules under which this fund was established that the pension should be paid to provide a comfortable maintenance for the widows and a suitable education for the children. There is no mention of a future husband, for whom no man would have been likely to provide by contributions during his life, and it is most distinctly provided that any person attempting to alienate the pension should forfeit all right to it. A widow, therefore, would have no power to assign the pension upon her marriage with a second husband.

(1) 2 Russ. & My. 175, 180.
(2) 4 Drew. 32, 37.
(3) T. & R. 222, 223.
(4) 3 Atk. 399.
(5) Law Rep. 4 H. L. 288.

*Higgins*, Q.C., and *B. Rogers*, for the husband:—

It is well established that you cannot deprive a husband of his legal right, except by the plainest words. That principle has been laid down in numerous cases, and particularly in *Tyler* v. *Lake* (1) and *Massey* v. *Parker* (2). A trust to pay the income of a fund to a married woman and her assigns was held in *Lumb* v. *Milnes* (3) to be insufficient to prevent the marital right from attaching; a gift to trustees to pay the interest to a wife, to be by her applied to and for the maintenance of herself and children, does not create a trust for the separate use of the wife: *Wardle* v. *Claxton* (4). A gift to a wife for her use has been held not to be sufficient to create a separate use: *Jacobs* v. *Amyatt* (5); nor "for her own use": *Wills* v. *Sayers* (6); nor "for her own use and benefit": *Roberts* v. *Spicer* (7); nor "for her sole use and benefit": *Gilbert* v. *Lewis* (8). The same principle may be collected from other cases, such as *Johnes* v. *Lockhart* (9), *Bullock* v. *Menzies* (10), *Barrow* v. *Barrow* (11), and *Gilbert* v. *Lewis* (12).

[They also referred to *Peachy* on Settlements (13).]

*Macnaghten*, for the trustees of the deed by which the pension was provided.

*Glasse*, in reply.



MALINS, V.C.:—

This is a very painful dispute, and it has been carried on with great hostility and bitterness. The facts are shortly these: Mrs. *Steward*, upon the death of her first husband, who was a clerk in the service of the *East India Company*, became entitled to a pension of £130 a year from the fund established by the *East India Company* for the support of the widows and families of their servants. It is well known that this fund has been a great blessing

(1) 2 Russ. & My. 183, 188.
(2) 2 My. & K. 174, 181.
(3) 5 Ves. 517.
(4) 9 Sim. 524.
(5) 1 Madd. 376, n.
(6) 4 Madd. 409.
(7) 5 Madd. 491.
(8) 1 D. J. & S. 38.
(9) 3 Bro. C. C. 383, Belts Ed.
(10) 4 Ves. 798.
(11) 18 Beav. 529.
(12) 2 J. & H. 452; S. C. on appeal, 1 D. J. & S. 38.
(13) Page 281.

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to numerous families, and the *East India Company*, who had paid their servants liberally, imposed upon them the obligation to subscribe to the fund, being desirous that none of the persons employed by them should leave their families destitute. Mr. *Peacock* died in 1866, and the pension to his widow was granted in 1867. She was then only thirty-seven years of age, and had a son who was fifteen years of age at the death of Mr. *Peacock*. In 1869 she married the Respondent, Mr. *Steward*, who was at that time thirty-five years old. All he had in the world was £1800, and being without any occupation in life, he had no means of gaining a livelihood, much less of supporting his wife. Now it is perfectly clear that if this lady had made a marriage settlement and an assignment to trustees upon trust to pay this pension to her husband, that would have been a forfeiture of it. But she made no settlement. The husband and wife lived together till 1874. They seem to have lived a very unhappy life; they quarrelled, and ultimately, in 1874, separated. It is not for me to express an opinion as to which of them was most to blame, but there was a formal separation between them. It seems that while they were living together the pension was received upon the joint receipt of the husband and wife, but after the separation the lady claimed the right to receive the pension. The husband made a counter-claim, and refused to sign the receipt, and as the trustees of the fund, in conformity with their custom, refused to pay the pension to either party, the money has been accumulated, and the arrears, amounting to £541 6*s*., have now been paid into Court by the trustees, and I am called upon to decide who is entitled to those arrears of pension. Now the husband says this: "This property to which my wife is entitled I am entitled to. I married her, and by marrying her I become entitled to all her personal property, and therefore I am entitled to this pension." On the other hand, the wife says: "You are not entitled to it in any way, for I am entitled to it for my separate use. You have no right to it whatever. It is inalienable, and consequently I am to receive it, and you are not entitled to any part of it." The husband very candidly admits that he has no means of subsistence whatever. He is now of the age of forty-four, and is being supported by his mother, who must be rather advanced in life; and

as far as I can see, if he does not exert himself to do something, he will be in a state of destitution. If this pension were to go to him, and he got it all for himself, the consequence would be that the wife would be left entirely destitute.

Under these circumstances I am to see what were the objects for which the pension was granted. The object of the fund was to provide for the widows and children of the subscribers; but in the case of there being neither widow nor children, as in the case of a man dying a bachelor, then in some cases it may go to a father or widowed mother. But where there are a widow and children, they are to be the primary objects of the fund.

Now, looking at the frame of the deed, and looking at the objects in view, can there be the slightest doubt whatever that it was never the intention of the subscribers to this fund to make a provision for a second husband of a wife? Can I believe that the first husband, who paid his subscription while he continued to be in the service of the Company, and who was called upon to pay it, could have intended to make a provision for a second husband of his wife? Can I consider that such an obligation could be forced upon the subscriber as that he should provide for a second husband, and by so doing leave his widow destitute? The very object of the fund is to provide for widows and children—not second husbands, but the widows and children of the subscribers to the fund.

When we consider whether it is separate use or not, we must look at all the surrounding circumstances; and I suggested to the counsel for the Respondent that it would be of very little use citing those cases which related to the particular words in a particular will or gift. I am very familiar with the cases; and some of them have been recalled to my recollection, but I think nobody will say that they stand on a very satisfactory footing, or that any rational rule can be deduced from them. I find anything but a rational rule laid down. However, I think the result may be stated thus: that there must be in a will, or in any other instrument, an intention shewn that the wife shall take and that the husband shall not.

But here I have an instrument of a very peculiar nature. I must look, as I have said, at the object of the subscribers to this

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fund, and I must look to what were the objects of those who founded the fund. I think the true rule is laid down by Lord *Brougham* in the case of *Stanton* v. *Hall* (1), in which he says that no particular form of words is necessary in order to vest property in a married woman for her separate use. That intention, although not expressed in terms, might still be inferred from the nature of the provisoes annexed to the gift. In this case nothing appears in the language from which a contrary inference can be drawn.

Then there is also the passage in Lord *Cairns'* judgment in the case of *Massy* v. *Rowen* (2), which is to the same effect, that although two or three words together will not be sufficient, you must look at the whole framing of the instrument to see what the object is, and to see what the intention is, to be collected from the instrument.

If I pass from the improbable objects and intentions attributed to the framers of this instrument and look to the probable intentions and see what the framers had in view, I can have no doubt in coming to the conclusion that the object was to make a provision for the widows and children, and not to make a provision for persons claiming under or through the widows or children. The second husband was never in the service of the *East India Company*, and he can have no claim except through the widow, and, as I collect, the object was that nobody claiming through a widow or through a child should have any benefit from this fund.

Now what are the objects assigned? Looking at the nature of the instrument, and looking to the objects in view, is it carried out by the words of the instrument? The 12th rule is this:—[His Lordship read that rule.]

It is said that the words "comfortable maintenance" used in the 12th rule do not mean separate use. For the purpose of my decision I will assume that to be correct; but then comes the 13th rule:—[His Lordship read that rule.] No question is raised here as to forfeiture. The trustees do not raise that point as to the ension being an existing fund, but the only question is, who is entitled to it?

If a woman has property in possession, and she marries, she disposes of her property, and the husband becomes immediately

(1) 2 Russ. & My. 175. (2) Law Rep. 4 H. L. 301.

entitled to the whole of her personal property and any property she may become entitled to *in futuro* if he survive her. But what is the object of the 12th rule? It says, "comfortable maintenance for the widow." How is she to have a comfortable maintenance, if when she marries she loses her right to it, and a second husband becomes entitled to it. Is it intended that a second husband shall take it? The words are most cautiously inserted—there are abundance of words—to provide against this very mischief: that she shall not directly or indirectly dispose of the property; and yet it is said that she has disposed of it, not by an involuntary act, but by her own voluntary act—by marrying a second husband. Taking the two rules together, although I agree with the argument that one is not sufficient, yet the two together are abundantly sufficient to shew that there is a provision made for the "comfortable maintenance" of the widow, that it is not to be alienable, and that no person claiming through her directly or indirectly shall be entitled to it.

Upon these grounds, without going into the numerous cases which have been cited as to what words will or will not make separate use, I come very distinctly to the conclusion that no person can ever derive a benefit from this fund except the person to whom the immediate grant is made. If it be a child, that child cannot assign it; and if he attempts to do so, it is a forfeiture. If it be a widow, no person claiming through her can take the benefit of it. The husband here claims through her, because he has married her, to take the whole of the fund and leave the wife entirely without subsistence. I understand that there is no question in this case that the lady has not a farthing in the world but this pension. She is not supported now by this fund, but she is supported by her son, who is stated to be a clerk in a banking house, and if her son should marry or discontinue to support her, she would not have a farthing, and she would be left in a state of destitution. That that should be the case, is, in my opinion, entirely contrary to the intention of the subscribers, and contrary to the intention of the framer of the instrument, and contrary to the language of the instrument itself.

Therefore I make an order in accordance with the prayer of the petition, that all the arrears be paid to the Petitioner, and that

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she is, as far as I can decide, entitled to the pension; in other words, that the husband has no right or title to it.

*Macnaghten* asked whether His Lordship would state that, according to the true construction of the trust deed, the lady was entitled to have the pension for her separate use.

A question was also raised as to costs.

MALINS, V.C.:—

As to the costs, I think it was justifiable to raise the question, and the Petitioner could not have received the money without a decision of the Court. Under the circumstances, and considering that the Respondent is her husband, I do not think that he ought to be deprived of his costs. I will, therefore, declare, that according to the true construction of the deed for providing a fund for the benefit of the widows and families of deceased officers and clerks of the *East India Company's* Regular Home Establishment, the pension provided for Mrs. *Steward* was intended to be for her separate use. Tax the costs of the Respondent *Steward*, and reserve £100 in Court to provide for such costs when taxed. Order payment of residue of fund in Court to Mrs. *Steward* on her separate receipt. The costs of the trustees to be retained by them out of dividend.

Solicitors: *Sole, Turners, & Knight; W. J. Foster.*

## *In re* SCARTH.

V.-C. M.
1879
*Feb.* 7.

*Settled Estates Act* (19 & 20 *Vict. c.* 120), *s.* 23—*Minerals—Surface—Will.*

A testatrix, having an absolute power of appointment, gave the surface of land to her nephew, and the minerals under it to others. Under the *Settled Estates Act* a lease of the minerals had previously been made, and a part of the rents received had been set aside and was in the hands of trustees to be invested under the Act in the purchase of other land :—

*Held*, that the rents so set aside were land in the hands of the trustees and passed with the surface.

Statement.

*RICHARD SCARTH*, by his will, gave certain lands in the county of *York* to his sisters, *Jane Scarth* and *Elizabeth Scarth*, for their lives, with remainder to trustees on trusts for the issue of his sisters; but if *Jane Scarth* should die without issue (which event happened), then the trustees were to stand seised of one moiety of the said lands upon such trusts as *Jane Scarth* should by will appoint. The testator died in 1864; and *Jane Scarth*, afterwards *Jane Dixon*, died in 1875 without issue. By her will she, in pursuance of the power and authority given by the will of *Richard Scarth*, appointed her moiety of the said lands to trustees upon trust for her husband for his life, and after his death upon trust to raise a sum of £1000; and, "subject as aforesaid, the same hereditaments and premises, except the mines and minerals within and under the same, and the necessary powers for winning and working the same, shall be for the use of my nephew, *William Scarth Dixon*, his heirs, executors, administrators, and assigns;" and as to the said mines and minerals, the testatrix appointed that her said trustees should stand seised thereof, and of the rents and royalties for working the same, upon trust for *William Scarth Dixon*, two other nephews, and a niece.

By an order made on the 14th of July, 1871, under the *Settled Estates Act*, the trustees of *Richard Scarth's* will had been empowered to grant leases of the minerals under the said lands; and it was ordered that all the money to be set aside out of the rents or payments on any such leases should be paid to the trustees of the will, and that until such money should be applied to one or

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more of the purposes mentioned in the Acts, the interest should be paid to the tenant for life.

Statement.

The trustees made leases of certain of the mines and minerals, and set aside, according to the *Settled Estates Act* (19 & 20 Vict. c. 120), s. 2, three-fourths of the rents received, which three-fourths at the death of *Jane Dixon* consisted of £3743 consols and £977 cash.

The two nephews and the niece interested under *Jane Dixon's* will in the mines and minerals now petitioned for payment to them and *William Scarth Dixon* of one moiety of this sum.

Argument.

*Bury*, for the Petitioners:—

This money arose from mines, and the testatrix has expressly separated it and disposed of it. She had power to dispose of the land and of the money, and she has shewn her intention to be that the produce of the mines and minerals shall go to one set of nephews and nieces, and the surface of the land only to her nephew.

*Northmore Lawrence*, for *William Scarth Dixon*:—

Under 19 & 20 Vict. c. 120, s. 23, all money set aside out of any rent for minerals is to be applied either in the discharge of incumbrances, or in "the purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid;" and this money must, therefore, be considered as part of *Richard Scarth's* land at the time of *Jane Dixon's* death, and passes under sect. 46 of the *Wills Act* to the devisee of the land. At that time it was not mines or minerals at all, but part of *Richard Scarth's* land.

*Bury*, in reply.

Judgment.

MALINS, V.C., after stating the facts of the case, continued:—

In the events which happened, therefore, Mrs. *Dixon* had a general power of appointment, and could give the surface in one way and the mines and minerals in another. Accordingly she has severed them, giving the surface to her nephew, *William Scarth Dixon*, and the mines and minerals to trustees in trust for *William Scarth Dixon* and others of her nephews and nieces.

Now the will speaks as from her death, and at that time this money did not represent mines and minerals within and under the said hereditaments and premises, for they had been taken from under the land and formed part of the estate. If she had given the estate without separating the mines and minerals, this money would clearly have gone as part of the estate, and what difference can the gift of mines and minerals make? The object of the will was to give the estate, except the mines and minerals, to one nephew, and the mines and minerals to him and others. The only exception was the mines and minerals under the said hereditaments and premises, and this money was not mines and minerals under the said hereditaments and premises, but was money liable to be invested in the purchase of land, which would pass with the other estates. She only gave the mines and minerals under the estate, with the necessary powers for working the mines. That did not include this money, which must pass with the surface.

Solicitors: *R. M. & T. Lowe.*

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*April* 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 16.

## CARGILL *v.* BOWER.

[1875 C. 42A.]

*Company—Fraudulent Prospectus—Principal and Agent—Liability of Agent for Fraud of Co-agent—Directors—Liability of Director for Fraud of Co-director—Amendment of Pleadings—Action by Shareholder to rescind Contract to take Shares—Winding-up Petition—Appearance of Plaintiff as Contributory on hearing of Petition—Election to claim Rescission in the Winding-up Proceedings—Companies Act*, 1862, *s.* 74—*Rules of Court*, 1875, *Order* XXVII., *r.* 1.

A director of a company is not liable for a fraud (such as the issue of a fraudulent prospectus of the company) committed by his co-directors or by any other agent of the company, unless he has either expressly authorized or tacitly permitted its commission.

*Peek* v. *Gurney* (1) explained.

*Weir* v. *Barnett* (2) followed.

On the 22nd of November a shareholder in a company commenced an action against the company and its directors. By the indorsement on the writ he claimed to have the allotment of shares to him cancelled, on the ground that he had been induced to take the shares by the fraudulent misrepresentations of the Defendants; and that the Defendants might be declared jointly and severally liable to repay him what he had paid for the shares and to indemnify him against any further liability. On the 29th of November a petition was presented to wind up the company. On the 18th of December the petition was heard, and a winding-up order was made, the Plaintiff then appearing as a contributory to support the petition, and the order providing for the payment of his costs in that character. On the 3rd of April the Plaintiff delivered a statement of claim in the action, by which he claimed the same relief as that which he had claimed by the indorsement on the writ, with this exception, that he did not expressly ask that the allotment of shares might be cancelled. There was a claim for further or other relief. After this the liquidator applied in the winding-up to put the Plaintiff on the list of contributories; the Plaintiff resisted the application, and it was ordered to stand over until after the trial of the action:—

*Held*, that on the pleadings as they stood the Plaintiff could not claim the rescission of his contract to take the shares.

And leave to amend the statement of claim was refused, on the ground that by his conduct the Plaintiff had elected to claim the rescission of the contract, not in the action, but in the winding-up.

*Semble*, that, the Plaintiff not having claimed rescission of the contract, he could not have any other relief in the action as against the company.

Statement.

THE writ in this action was issued on the 22nd of November, 1875, and it was indorsed with a claim, 1, to have an allotment of

(1) Law Rep. 6 H. L. 377. (2) 3 Ex. D. 32.

2000 shares to the Plaintiff in the *Bristol Imperial Insurance Corporation, Limited*, of which he was then the registered holder, cancelled, on the ground that he was induced to apply for and take the shares by the fraudulent misrepresentations of the Defendants or some or one of them, for which they were all responsible; 2, that the Defendants might be declared to be jointly and severally liable, and be ordered to repay to him the sum of £1000 paid by him to the company in respect of the shares; 3, to be indemnified by the Defendants jointly and severally against any calls or liability on the shares, or any of them. The indorsement stated that the Defendants *A. Bower, J. A. Feigan, T. A. Hanson, R. Jones, John Parkinson*, and *John Turner*, were sued as directors of the corporation, who were also Defendants. On the 29th of November, 1875, a petition was presented by a creditor and contributory for the winding-up of the company, upon which, on the 10th of December, a winding-up order was made. On this occasion the Plaintiff appeared in the character of a contributory to support the prayer of the petition, and the order provided for the payment by the official liquidator, out of the company's assets, of the Plaintiff's costs of appearance in that character. On the 3rd of April, 1876, the Plaintiff delivered a statement of claim in the action, by which he claimed, 1, a declaration that under the circumstances therein stated the Defendants were jointly and severally liable to repay him the sum of £1000 paid by him upon the shares, with interest, and to indemnify him against all further liability on the 2000 shares. 2. Repayment to the Plaintiff by the Defendants or some or one of them of the £1000, and such indemnity from them against such liability as the Judge should consider sufficient. 3. Payment by the Defendants or some or one of them of the costs of the action. 4. Such further or other relief as the nature of the case might require. After this the liquidator applied in the winding-up to put the Plaintiff on the list of contributories; the Plaintiff resisted the application, and it was ordered to stand over until after the trial of the action.

The case alleged by the statement of claim was in substance as follows:—

The Defendant *Feigan* was the manager and general superintendent, as well as a director of the company; the other Defen-

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dants were in May, 1874, and for some time afterwards, directors of the company. In June, 1874, the Plaintiff, who was a chemist at *Brighton*, was invited by a Mr. *Fullager*, who was one of the local agents of the company, to purchase shares in the company, and in order to induce him to do so *Fullager* gave or shewed to him certain pamphlets, circulars, and prospectuses issued and circulated on behalf of the company, and which had been sent by the authority of the then directors to *Fullager* in order that they might be given or shewn by him to the Plaintiff and other persons, with a view of inducing them to take shares in the company. These documents represented the company as most flourishing and successful, and sure to pay high interest on its shares; that its capital was being increased, and that it had already attained a good position. *Fullager* also made verbal representations to the same effect. On the faith of the representations thus made to him, the Plaintiff, in June, 1874, applied for 1000 shares of £1 each in the company, and the same were on the 23rd of June, 1874, allotted to him by the directors. In July, 1874, the Plaintiff was induced by further representations of a similar character to apply for 1000 more shares, which were allotted to him on the 18th of July, 1874, and he paid to the company £1000 on account of the 2000 shares. He had no reason to doubt the truth of the representations made to him until the presentation of the winding-up petition became known to him. He then caused inquiries to be made, and for the first time ascertained that the representations made to him, and in reliance on which he had applied for the shares and had paid the £1000, were, to the knowledge of the Defendants the directors, deceptive and untrue, and that at the respective dates when he applied for the shares the company, instead of being in a solvent and prosperous condition, was, to the knowledge of the respective Defendants the directors, insolvent and certain to fail. The assets of the company were insufficient for the payment of its debts, and its shares were of no value.

The Defendants denied the Plaintiff's allegations. The Defendant *Feigan* had died before the trial.

By the evidence at the trial it appeared that the only documents which could be identified as having been produced to the Plaintiff by *Fullager* before his first application for shares were an

Statement.

abridged prospectus of the company, and a book containing a report of the directors presented at a general meeting of the company together with a report of the proceedings at that meeting, and it was also proved that before his second application for shares there were also shewn to him a copy of a number of a newspaper called the *Investors' Guardian*, published on the 13th of June, 1874; a copy of another number of the same newspaper, published on the 27th of June, 1874; two letters written by *Feigan*, and a letter written by the Defendant *Parkinson*.

Argument.

*Hemming*, Q.C., and *Grosvenor Woods*, for the Plaintiff:—

The alleged misrepresentations are proved, and the directors as well as the company are all responsible for them, even though some of them may have been personally innocent: *Peek* v. *Gurney* (1); *Mackay* v. *Commercial Bank of New Brunswick* (2); *Barwick* v. *English Joint Stock Bank* (3); *New Brunswick, &c., Company* v. *Muggeridge* (4); *New Brunswick, &c., Company* v. *Conybeare* (5); *Central Railway Company of Venezuela* v. *Kisch* (6); *Henderson* v. *Lacon* (7).

The course of business was, to the knowledge of all the directors, to supply agents with laudatory prospectuses and other documents, mostly prepared by *Feigan*, to be used for the purpose of inducing persons to take shares, and it is no defence for a director to say that he allowed this to go on without examining the papers to see whether they were honest or fraudulent.

In *Peek* v. *Gurney* the House of Lords, though they held that the bill must be dismissed because the Plaintiff was not an original allottee of shares, yet expressed an opinion that *Barclay*, one of the directors of *Overend, Gurney, & Co.*, was liable for the misrepresentations contained in a prospectus, in the preparation and issuing of which he had taken no part, and which he had never read. As against the company the Plaintiff is entitled, upon the pleadings as they stand, to claim rescission of the contract to take shares. But, if necessary, we ask leave to amend

(1) Law Rep. 6 H. L. 377.
(2) Ibid. 5 P. C. 394.
(3) Ibid. 2 Ex. 259.
(4) 1 Dr. & Sm. 363.
(5) 9 H. L. C. 711.
(6) Law Rep. 2 H. L. 99.
(7) Law Rep. 5 Eq. 249.

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the statement of claim by inserting an express claim for rescission. The action was commenced before the commencement of the winding-up, and in the indorsement of the writ rescission is expressly asked for. The omission to ask for it in the statement of claim was a mere slip, for that which is asked for against the company implies rescission of the contract.

At the conclusion of the opening of the Plaintiff's case, and before his witnesses were called,

*North*, Q.C., and *Millar*, for the company, asked that the question of amendment might be decided at once, that they might know what case the company had to meet.

FRY, J., assented to this.

*North*, Q.C. :—

The Plaintiff, by his appearance on the winding-up petition in the character of a contributory, is estopped from saying that he is not a contributory. He cannot, therefore, be allowed now to claim rescission of the contract. At any rate, by omitting in the statement of claim to ask for rescission, the Plaintiff has abandoned to that extent the relief which he originally asked in the indorsement of the writ. He has elected to remain a shareholder, and on that footing he claims indemnity from the company as well as from the directors. Indemnity implies that his liability as a shareholder continues; it would not continue if the contract was rescinded. A claim to rescind the contract would be inconsistent with a claim for indemnity, and an amendment will not be allowed for the purpose of introducing inconsistent claims: *Newby* v. *Sharpe* (1).

[FRY, J. :—In *Child* v. *Stenning* (2) claims for alternative inconsistent relief were allowed.]

The claims there were against different persons.

*Hemming*, Q.C., for the Plaintiff :—

If a man whose name is upon a company's register of shareholders

(1) 8 Ch. D. 39. (2) 5 Ch. D. 695.

appears upon a winding-up petition in the character of a contributory, either to support or to oppose the petition, it cannot be said that he has finally elected to remain a shareholder. He appears as an alleged contributory, and is always allowed afterwards to dispute his liability, as has been done in this case. In the present case the writ in the action had been already issued, and it is clear that the Plaintiff did not mean to abandon his right of action. The company might perhaps have objected to his having his costs of appearance on the petition. "Contributory" is defined in sect. 74 of the *Companies Act*, 1862, as including in all proceedings prior to the final determination of the persons who are to be deemed contributories, "any person alleged to be a contributory." *In re Anglesea Colliery Company* (1) shews that a holder of fully paid-up shares is entitled as a "contributory" to present a petition for the winding-up of the company. It cannot be said that the Plaintiff has abandoned his claim for rescission of the contract, for he expressly asks that the company may be ordered to repay him what he has paid for the shares. He cannot be entitled to that except on the footing of rescission. The amendment would be a purely formal one, and would prevent the necessity of taking proceedings in the winding-up to get the Plaintiff's name removed from the list of contributories. The Plaintiff cannot elect to abandon his right to rescission in regard to future liability on the shares while he retains it in regard to what he has already paid. The case is very different from *Newby* v. *Sharpe* (2). The most that can be said is, that it may have been thought more convenient to raise the question of future liability in the winding-up. There has been a mere slip in the pleadings. The case is exactly like *Henderson* v. *Lacon* (3), with the exception that here the statement of claim was delivered after the commencement of the winding-up, and the Plaintiff is entitled to the same relief as was given in that case, viz., a declaration of his right to have his name removed from the company's register. The claim for further relief is sufficient to include rescission of the contract. But if not, the amendment asked will enable justice to be done without inconvenience to any one; for we do not ask to introduce a single new statement or a

(1) Law Rep. 1 Ch. 555. (2) 8 Ch. D. 39.
(3) Law Rep. 5 Eq. 249.

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single new piece of evidence. We allege all the facts necessary to support a claim for rescission. The fraud covers the whole of that relief.

FRY, J.:—

The decision which I am now about to give is upon two points arising between the Plaintiff and the company, and it will be without prejudice to any proceedings in the winding-up. The first question is whether, upon the statement of claim as it now stands, the company are called upon to meet a claim for the rescission of the Plaintiff's contract to take shares. The prayer, as I may call it, seems to me to be addressed simply to one thing, *i.e.*, repayment of the money which the Plaintiff has already paid, and indemnity against all further liability upon his contract. That, as it seems to me, imports the existence of the contract, for you cannot have indemnity against liability unless a liability exists. A prayer for indemnity against a liability imports the existence of a liability. The notion that the prayer for further relief will cover a claim for the rescission of the contract seems to me to be excluded by this consideration, that such a prayer must always be limited by two things—the facts which are alleged and the relief which is expressly asked. You cannot, under a general prayer for further relief, obtain any relief inconsistent with that relief which is expressly asked for. And here there is no allegation in the statement of claim of any right to rescind the contract.

The next question is whether I ought to allow the amendment which is asked for. The Plaintiff was aware in July, 1875, of all the material facts on which he relies. He issued his writ in November, and it was addressed to two things, rescission of the contract and indemnity against future liability arising under it. This, no doubt, was a perfectly consistent claim, for rescission might not be granted at the hearing, and liability might accrue under the contract before the hearing. Then, in December the Plaintiff appeared as a contributory on the hearing of the winding-up petition and supported the prayer, and costs were allowed to him as a contributory supporting the petition. In April, 1876, he delivered his statement of claim, and he dropped out of the prayer all claim to relief in the nature of rescission of the contract, and

only asked for relief in the nature of indemnity. Afterwards an application was made in the winding-up to put him on the list of contributories, he resisted the application, and it was ordered to stand over until after the trial of this action. Under these circumstances I think that I ought not to give leave to amend the statement of claim. It is not necessary for me to say whether the Plaintiff has finally elected to approbate the contract, but I think that he has by his conduct at any rate expressed an intention and desire to assert his claim to rescission of the contract only in the winding-up proceedings. I therefore refuse to give leave to amend.

Argument.

*Cookson*, Q.C., and *J. Rigby*, for the Defendants *Bower*, *Jones*, *Parkinson*, and *Turner* :—

In order to succeed the Plaintiff must shew that representations of material facts were made to him with the view of inducing him to take shares in the company; that he relied upon those representations; that those representations were untrue, and that they were untrue to the knowledge of the Defendants: *Jennings* v. *Broughton* (1); *Holt's Case* (2); *Nicol's Case* (3). The Plaintiff has failed in proving these things. He must be confined strictly to the representations which he has alleged: *Central Railway Company of Venezuela* v. *Kisch* (4); *New Brunswick, &c., Company* v. *Conybeare* (5).

[FRY, J., referred to *Bullen* and *Leake's* Pleading (6); *National Exchange Company of Glasgow* v. *Drew* (7).]

He is not entitled to any relief upon the facts which he has proved. The directors are not responsible for any misrepresentations which they did not authorize either expressly or tacitly; they are not responsible for what either *Feigan* or *Fullager* did without their authority. The company may be responsible for the acts of their agents, but an agent of the company is not the agent of the directors. *Mackay* v. *Commercial Bank of New Brunswick* (8) was not a case in which directors were held liable. *Peek* v. *Gurney* (9)

(1) 5 D. M. & G. 126.
(2) 22 Beav. 48.
(3) 3 De G. & J. 387.
(4) Law Rep. 2 H. L. 99.
(5) 9 H. L. C. 711.
(6) Page 334.
(7) 2 Macq. 103.
(8) Law Rep. 5 P. C. 394.
(9) Law Rep. 6 H. L. 377.

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amounts to nothing more than a decision that on the facts there proved *Barclay* must be taken to have authorized his co-directors to issue such a prospectus as they did issue. The recent case of *Weir* v. *Barnett* (1) is inconsistent with any other view. There it was held that directors of a company were not responsible for misrepresentations as to the position of a company made by a firm of brokers whom they had employed, they not having authorized the making of any misrepresentation. An action for deceit must be founded on actual, not constructive fraud: *Dickson* v. *Reuter's Telegram Company* (2). The misrepresentation must be wilful and fraudulent: *Eaglesfield* v. *Marquis of Londonderry* (3); *Shrewsbury* v. *Blount* (4); *Rawlings* v. *Bell* (5). A director is not bound to go out of his way to inquire whether everything has been done as it ought to have been done; he is only liable for his own acts, or the acts of his co-directors or other agents of the company which he has authorized either expressly or tacitly.

[They referred also to *Burnes* v. *Pennell* (6).]

*Locock Webb*, Q.C., and *T. Brett*, for the Defendant *Hanson*:—

A director is not liable for mere negligence: *Land Credit Company of Ireland* v. *Lord Fermoy* (7); *Ashhurst* v. *Mason* (8). It must be shewn that he has been guilty of *mala fides*: *Henderson* v. *Lacon* (9); *Ship* v. *Crosskill* (10).

[They referred also to *Hallows* v. *Fernie* (11).]

*North*, Q.C., and *Millar*, for the company:—

*Western Bank of Scotland* v. *Addie* (12) and *Mackay* v. *Commercial Bank of New Brunswick* (13) are distinguishable from the present case. Here the Plaintiff has declined to ask for rescission of the contract. He cannot be allowed to blow hot and cold; he cannot have relief in the nature of indemnity against the directors on the ground that he is liable as a shareholder, and at the same

(1) 3 Ex. D. 32.
(2) 3 C. P. D. 1.
(3) 4 Ch. D. 693, 711.
(4) 2 Man. & G. 475.
(5) 1 C. B. 951.
(6) 2 H. L. C. 497.
(7) Law Rep. 5 Ch. 763.
(8) Ibid. 20 Eq. 225.
(9) Ibid. 5 Eq. 249.
(10) Ibid. 10 Eq. 73.
(11) Ibid. 3 Ch. 467.
(12) Ibid. 1 H. L., Sc. 145.
(13) Law Rep. 5 P. C. 394.

time have relief against the company on the ground that he is not a shareholder. A simple action of deceit cannot lie against a company. To support such an action there must be *mens rea*. If the contract was obtained by the fraud of the company's agents the only remedy against the company is rescission. That remedy the Plaintiff has elected not to ask for. *Barwick* v. *English Joint Stock Bank* (1) is distinguishable. The documents upon which the Plaintiff says he relied contained no misrepresentation; if they did, the Plaintiff has not shewn that he acted in reliance upon them.

*Hemming*, in reply:—

*Peek* v. *Gurney* (2) is conclusive that a director is liable for the contents of a document issued by his co-directors, though he did not expressly authorize its issue. If *Weir* v. *Barnett* (3) is inconsistent with *Peek* v. *Gurney*, it cannot overrule it. *Peek* v. *Gurney* does not appear to have been cited in the argument of *Weir* v. *Barnett*. But in that case the attempt was to make directors liable for the unauthorized act, not of one of themselves acting on behalf of the board, one of the ordinary officers of the company, but of an agent employed *pro hâc vice*. An appeal has been brought from the decision in *Weir* v. *Barnett*, and the Court of Appeal have taken time to consider their judgment (4). *Eaglesfield* v. *Marquis of Londonderry* (5) is an authority in our favour. The decision of the Court of Appeal differed from that of the Master of the Rolls because they took a different view of the facts. It is not necessary to shew personal *mala fides* on the part of a director. If a man with the view of inducing another to act puts forward a statement as true without taking the trouble to inquire whether it is true, and it turns out to be untrue, he is liable just as if he knew it to be untrue: *Taylor* v. *Ashton* (6). It is not enough for directors to say that they have put forth statements from which a person whose intellect is much above the average might possibly discover the truth; if they take upon themselves to make statements, the statements must be intelligible to persons of ordinary

(1) Law Rep. 2 Ex. 259.
(2) Ibid. 6 H. L. 377.
(3) 3 Ex. D. 32.
(4) Judgment since delivered, 3 Ex. D. 238.
(5) 4 Ch. D. 693.
(6) 11 M. & W. 401.

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understanding. As against the company the action is one for money had and received; the Plaintiff has not elected to abandon his right to rescind the contract; he has only elected to seek that relief in the winding-up.

Judgment.

FRY, J., after stating the nature of the action, the constitution of the company, and the effect of the evidence as to the documents which were shewn to the Plaintiff before his respective applications for shares, continued:—

The first question which arises is this: Supposing that the Plaintiff is correct in alleging that these documents and the representations of Mr. *Fullager* contained fraudulent misrepresentations, who is liable for them? Therefore it becomes necessary to inquire with regard to each of these documents who was the author of it. With regard to the prospectus, I come to the conclusion upon the evidence before me that Mr. *Feigan* must be deemed to have been the author of it; the knowledge of it is not brought home personally to any of the Defendants the directors. With regard to the report, it appears to me that *Feigan* is clearly responsible for it, and that Mr. *Jones* and Mr. *Turner* are also responsible, because they were both present at a meeting of the directors held on the 28th of April, 1874, at which they approved the report as one to be presented at a meeting of shareholders. With regard to the *Investors' Guardian* of the 13th of June, I think that upon the evidence *Feigan* must be taken to have been the author of that paper, and it seems to me probable that Mr. *Hanson* must also be considered as having given his authority to the issue of it to Mr. *Fullager*, for on the very day on which it was sent by Mr. *Feigan* to Mr. *Fullager* at *Brighton*, Mr. *Feigan* sent Mr. *Hanson* a copy of the paper, and told him that he had sent copies to *Fullager* and to the agents of the company generally. With regard to the *Investors' Guardian* of the 27th of June, and *Feigan's* letter, I am unable to find any other author for them than *Feigan*. For *Parkinson's* letter, *Parkinson* is clearly responsible, and I am unable to find that the contents of it, or the intention to write it, were communicated to any of the other Defendants before it was sent to Mr. *Fullager* in order that it might be shewn to the Plaintiff.

Inasmuch as *Fullager* was the agent of the company, and one of the objects of the company was to obtain subscriptions for their shares, it will be exceedingly difficult for the company to deny their liability for fraudulent statements of *Fullager* made in the performance of his duty as their agent, if such statements were made. I have pointed out the personal relations of the Defendants to each of these documents; and although that seems to me to be very important to consider in solving the question whether they are or are not responsible for any of the statements contained in them, I cannot let the matter rest there, because this argument has been addressed to me. It is said that on the 12th of May, 1874, all the five Defendant directors concurred in a resolution that 20,000 shares should be issued to the public, that they all knew or must be taken to have known that subscriptions for those shares would be obtained through the activity of the agents of the company, that all those agents were furnished from time to time with papers in order that they might shew them to intending shareholders, and that the employment of the agents for this purpose was deliberately resolved upon (because on the form of the letter of application for shares there was a memorandum of the agent through whom the applicant was introduced, and as a matter of fact the agents were to receive 5 per cent. commission on the applications which they brought), and therefore it is impossible to say that the directors did not know that applications had been made through their agents. Then it is said that, inasmuch as they knew that the agents would procure subscriptions, they are responsible for everything which was done in the obtaining of those subscriptions. Now that raises an important question of law, because it is to be observed that the directors themselves are only agents of the company. The agents throughout the country, including Mr. *Fullager*, were also agents of the company, and Mr. *Feigan* himself was an agent of the company. To what extent are agents liable for the frauds of their co-agents committed in respect of acts which they know that those co-agents are about to perform? I conceive the general law to be this, that the persons responsible for a fraud are of two classes. First, the actual perpetrators of the fraud, the authors of it, the agents who commit it, the parties to it; those who concur in it, who either do some-

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thing to produce the fraudulent result, or abstain from doing something which they are under an obligation to the deceived person to do in order to prevent fraud. Secondly, the principal for whom an agent in the performance of his duties as agent commits the fraud is also responsible. But, as a general rule, I think that one agent is not responsible for the acts of another agent, unless he does something by which he makes himself a principal in the fraud. It is said that that view of the law is inconsistent with the decision of the House of Lords in *Peek* v. *Gurney* (1), so far as it related to Mr. *Barclay*. Undoubtedly that case presents to my mind considerable difficulties; I think I ought with all candour to admit that. But, upon the whole, I have come to the conclusion that the principle on which the House of Lords must have proceeded was this, that Mr. *Barclay* gave authority to his fellow-directors or fellow-promoters to issue a prospectus of the company, and that, looking at all the circumstances of the case, he must be deemed to have given authority to issue such a prospectus as was actually issued; that he could not have supposed that a prospectus telling the whole truth could ever be issued, and that therefore the true inference was that he authorized the fraud which was committed. If that be not the principle of the decision in that case, it must, I think, be admitted that a totally new principle was introduced into the law. It would be impossible also to reconcile the decision with the case of *Weir* v. *Barnett* (2), which seems to me a very important authority, as shewing that the only persons who can be made responsible for a fraud are those who come within one or other of the two categories which I have mentioned. I entirely adopt the language of Mr. Baron *Bramwell* in *Swift* v. *Jewsbury* (3). "No doubt there are cases in which a man may be charged with having committed a fraud when he has not committed it himself; but I think that that ought to be held in as few cases as possible."

Then this further question arises: Did the Defendants by the course which they pursued really shut their eyes and hold their tongues with a view of enabling *Feigan* to commit the fraud which it is said he has committed? Did they wilfully and with a view

(1) Law Rep. 6 H. L. 377. (2) 3 Ex. D. 32.
(3) Law Rep. 9 Q. B. 315.

to enable him to do this abstain from interfering when they ought to have interfered? Upon that part of the case I have attended fully to the evidence, and it has produced a great impression on my mind. It appears that General *Boileau*, who was then a member of the board and the chairman of the *London* Committee, in the summer of 1873, came to two conclusions, the one that the company was in an exceedingly critical, if not dangerous, condition, and could be saved only by great vigilance and a great diminution of expenditure; the other that Mr. *Feigan* had made statements with regard to the income of the company which were false in a very material particular. That view General *Boileau* pressed upon the board of directors at *Manchester*, not once but twice. And it appears to me that the matter ought to have come home to the attention of Mr. *Jones*, Mr. *Turner*, and Mr. *Bower* (Mr. *Parkinson* and Mr. *Hanson* were not then members of the board) in a much more forcible way than it seems to have done. Mr. *Jones* says that at that time he had been incapacitated by a serious accident from attending to business, and that he sat at the board, not for the purpose of taking an independent part in the business, but only for the purpose of making a quorum. Mr. *Bower* and Mr. *Turner* have both been in the box before me, and, although they were present at no less than three meetings at which this matter was discussed, they were unable to give any explanation of what steps were taken to inquire into that very serious charge against Mr. *Feigan*. I think there was great negligence in the course which they pursued, and I must say that I have listened to the evidence which they have given on this point with great pain. Undoubtedly, with regard to Mr. *Hanson* and Mr. *Parkinson* the matter stands in a very different position. They were not members of the board at that time, but joined it subsequently. Mr. *Parkinson*, according to the evidence given before me, which I entirely believe, before he joined the board entertained the belief that the company might turn out a great success. Mr. *Hanson* took, as it seems to me, an entirely different view. He never felt any satisfaction in the concern, and the dissatisfaction which he felt at the very inception of his sitting on the board continued and increased, and yet he did not think it his duty to inquire, or did not in fact inquire, what circulars were

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being put out by Mr. *Feigan*, or the agents, in order to induce the numerous applications for shares which resulted in the allotments in which he himself took part. That again is a matter which it is impossible to consider without pain, and if upon the whole view of the facts I had come to the conclusion that the Defendant directors had wilfully abstained from inquiry in order that *Feigan* might commit frauds, then I need not say that I should have held them liable for those frauds. But I do not come to that conclusion. I think that there was great negligence, but that it was merely negligence and undue trust in *Feigan*, and that there was not any intention to allow him to commit fraud; and therefore I cannot hold them responsible for his acts. My conclusion, therefore, is, that those persons, and those only, who put out the particular documents, are responsible for them. Of course the company is responsible so far as the documents were put out in the ordinary course of the business of the company.

I come then to the next material inquiry, which is this, were the representations contained in those documents false, and I think I must add, fraudulent? I think I cannot consistently with the decision of the Court of Appeal in *Eaglesfield* v. *Marquis of Londonderry* (1), make any other inquiry than this—were the representations wilfully false and fraudulent? In determining this question, the issue being one of fraud, I must look with exactitude at the pleadings. It seems to me that the cases of *Central Railway Company of Venezuela* v. *Kisch* (2) and *National Exchange Company of Glasgow* v. *Drew* (3), and other authorities, teach me that, above all, in cases of fraud the decision of the Court must proceed *secundum allegata et probata.*

[His Lordship then examined the documents in question in detail, coming to the conclusion that the statements contained in them, if the whole of them were read, were not deceptive, but on the contrary, that the real condition of the company might be discovered from them. His Lordship continued :—]

I have also to inquire whether I can say that the representations made, even supposing that they were fraudulent and false, did bring about the contract.

(1) 4 Ch. D. 693. (2) Law Rep. 2 H. L. 99.
(3) 2 Macq. 103.

[His Lordship examined the evidence on this point, and came to the conclusion that the Plaintiff did not rely on any particular statement in the documents put before him, but upon *Fullager's* statement that the company was earning large profits, upon the social position of the directors and other persons connected with the company, the expectation that the scheme of the company would succeed, the hope of getting large interest for his money, the good opinion which *Parkinson* had expressed of the concern, and the general impression that it was a good concern. His Lordship added:—]

If people will adhere to the general conclusion that a concern is good, notwithstanding that they have placed before them statements which amount to this, "We are earning no profits; we have sunk our capital in the establishment of our business," they must do so at their own risk, and so doing they cannot turn round on those who have disclosed those facts to them and say, "Now that we are involved in a common disaster, I shall escape and you shall bear the whole brunt of the loss." The law does not enable them to do that.

A further question has been raised on behalf of the company. It is said that this is an action brought in effect against the Defendant directors for deceit, and against the company either for deceit or for rescission. It is said that you cannot have a simple action of deceit against a company, that where the fraud of other persons has resulted in a contract with a company the only relief that can be had against the company is to rescind the contract and get back the money paid on the footing of that rescission. After the judgment I have given on the rest of the case it is not necessary for me to decide this point, but as it has received considerable argument, I shall express my opinion about it. I think that the Plaintiff is in great difficulty as to the relief which he seeks against the company, and for this reason. He originally brought the action to rescind the contract; he has purposely omitted to ask for rescission by his statement of claim, and he has reserved that question for determination in the winding-up. The action therefore comes before me with the contract as an existing contract, and so long as that contract stands I could not direct the company to repay to the Plaintiff the moneys which, if the contract

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stands, are not properly repayable. He cannot have that money repaid unless the contract is rescinded.

The result of the whole is therefore this, that, although I cannot but say that the Defendants have been guilty of negligence, and of gross negligence, yet the Plaintiff has come here charging the Defendants with deliberate fraud, stating that he was induced to enter into a bargain by reason of representations put out by their authority, and which were to their knowledge deceptive and untrue. I think he has failed to prove that case, and I must dismiss the action with costs (1).

Solicitor for Plaintiff: *J. V. Musgrave.*

Solicitors for Defendants *Bower* and others: *Roberts & Barlow*, agents for *John Leigh, Manchester.*

Solicitors for Defendant *Hanson*: *Stokes, Saunders, & Stokes.*

Solicitors for Company: *Pritchard, Englefield, & Co.*

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[1877 Y. 13.]

*Public Right of Way—Implied Extinction by Statute—Construction of Statute—Saving Clause in General Act—Inconsistent Provision in subsequent Special Act—General Pier and Harbour Act*, 1861 (24 & 25 *Vict. c.* 45), *ss.* 11, 14.

A public right of way may be extinguished by statute by necessary implication as well as by express words.

A saving clause in a general Act has no operation if it is inconsistent with the express provisions of a subsequent special Act.

The saving clauses (sects. 11 and 14) of the *General Pier and Harbour Act*, 1861, do not apply to a public right of way.

A corporation were empowered by a provisional order of the Board of Trade, made under the authority of the *General Pier and Harbour Act*,

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(1) The Plaintiff presented an appeal from this decision. The appeal was opened before the Court of Appeal on the 5th of February, 1879, but before the opening was concluded a compromise was agreed upon between the parties, subject to the approval of Vice-Chancellor *Hall*, who had the conduct of the winding-up of the company. This approval was afterwards given, and the appeal was then withdrawn.

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1861, and confirmed by a subsequent special Act, to construct a pier in accordance with certain deposited plans. The plans shewed that the pier, when constructed, would be physically inconsistent with the existence of an alleged public right of access to the sea-shore from a street with which the pier was connected. The provisional order contained no words expressly extinguishing the right of way, or substituting another right of way for it:—

*Held*, that, if the alleged right of way had ever existed, it was extinguished by necessary implication, and that it was not saved by sects. 11 and 14 of the *General Pier and Harbour Act*, 1861.

Statement.

THIS action was brought by the Corporation of *Yarmouth*, in the *Isle of Wight*, claiming an injunction to restrain the Defendants from removing or disturbing any portion of a pier at *Yarmouth*, or the entrance or approach thereto, and from otherwise interrupting the communication between the pier and the town of *Yarmouth*.

The pier in question was constructed by the Plaintiffs under the authority of a provisional order made by the Board of Trade in pursuance of the powers conferred upon them by the *General Pier and Harbour Act*, 1861 (24 & 25 Vict. c. 45), and confirmed by the *Pier and Harbour Orders Confirmation Act*, 1874 (37 & 38 Vict. c. clxxxv.), and was completed in July, 1876. The pier was constructed in accordance with certain plans and sections deposited with the Board of Trade. It extended into the *Solent* 700 feet in a northerly direction from the north end of a street called *Bank Street*, which ran north and south, and its floor was on a level with that street. At the end adjoining the street the pier was wider than the street, extending some feet to the east and to the west of it. At the north end of the street there was a sea-wall, the top of which was level with the street, and was a few feet higher than the beach or shingle below. Before the construction of the pier it had been the custom for the inhabitants of *Yarmouth* and the public generally to pass from *Bank Street* to the beach by stepping off the sea-wall, and to pass from the beach to *Bank Street* by stepping on to the wall. When the pier was first constructed the Plaintiffs left an opening three or four feet wide in the fence or railing on each side of it at the end next to *Bank Street*, and through these openings the inhabitants obtained access to the beach by stepping off the pier, in place of the old method of access. But in July, 1877, the Plaintiffs closed these openings by placing gates across them, and refused to allow any persons to pass

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from the pier to the beach, or from the beach to the pier, except upon the payment of a toll. The Defendants then forcibly removed the gates. The Defendants asserted that, for a distance of thirteen feet northwards from the sea-wall, the pier was above the line of high-water mark, and that the Board of Trade could not give any effectual sanction to the erection of the pier so far as it extended above high-water mark; and on the 13th of July, 1877, the Defendants and thirty-two other persons, describing themselves as inhabitants and ratepayers of *Yarmouth*, served a notice in writing on the Plaintiffs, requiring them to remove within seven days that part of the pier which was situate to the south of high-water mark, adding that, if the demand was not complied with, "we the undersigned shall take measures to cause its removal in any way we think proper, as you have no power, right, or privilege to extend the pier southward of the limits before named." The writ in this action was issued on the 17th of July, 1877, claiming an injunction as above mentioned, and on the 19th of July an injunction to that effect was granted by Vice-Chancellor *Malins* until judgment in the action or further order. By their statement of claim the Plaintiffs claimed a perpetual injunction to the same effect, and damages for injury alleged to have been already done to the pier by the Defendants.

The Defendants, by their statement of defence, said that "the line of high-water mark is at a distance of about thirteen feet from the end of the northmost houses in *Bank Street*, and the public, and particularly the inhabitants for the time being of *Yarmouth*, including the Defendants, have from time immemorial had full and free, and have the right to full and free, access and regress to and from *Bank Street*, and to the sea-shore and beach."

And, by way of counter-claim, the Defendants alleged that the Plaintiffs had no right under the provisional order, or the Acts above mentioned, to erect the gates, or to continue the obstruction caused by the pier above high-water mark, nor to levy tolls from persons simply wishing to go to the beach and sea-shore. And the Defendants claimed an injunction to restrain the Plaintiffs from re-erecting or continuing the gates, or continuing the obstruction referred to in the notice of the 13th of July, 1877, or in any way obstructing the right of access to or regress from the beach and sea-

shore, and from levying any toll from persons proceeding to the beach or sea-shore.

By their reply the Plaintiffs denied the existence of the alleged right of access from *Bank Street* to the sea-shore, and said that after the erection of the pier the public were permitted by them to have access from the pier to the beach without the payment of toll, but that this permission amounted only to a license which the Plaintiffs were entitled to revoke at any time. The Plaintiffs also said that the line of high-water mark coincided with the northern end of *Bank Street*, and submitted that they were entitled by the Acts above mentioned to erect the gates in question, and to prevent any persons from proceeding from the pier to the beach, or from the beach to the pier, and that they were entitled to levy toll from all persons, including the Defendants, coming upon or using the pier. And the Plaintiffs said that the soil on or over which the gates in question were erected was either purchased by the Plaintiffs from the Board of Trade, or was otherwise vested in the Plaintiffs, and that that which the Defendants in their notice of the 13th of July described as an obstruction was a portion of the pier which the Plaintiffs by their Acts, and also as owners of the soil on which that portion was built, were authorized to make and continue.

The action was transferred to Mr. Justice *Fry* for trial.

The Provisional Order of the Board of Trade (set forth in the schedule to the Act 37 & 38 Vict. c. clxxxv.) provided by sect. 1 that the Plaintiffs should be the undertakers of the works authorized by the order, and should have and might exercise the several powers, privileges, and authorities by the order conferred on the undertakers, and might carry the order in all respects into execution. Sect. 2 incorporated with the order the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, "except so much thereof as relates to the purchase or taking of lands otherwise than by agreement." By sect 3: "For the purposes of the works authorized by this order the undertakers from time to time may appropriate, or may by agreement enter upon and take, and may use such of the lands and such parts of the foreshore shewn on the plans deposited for the purpose of this order, and the conveniences connected therewith, as they think expedient." Sect 4: "Subject to the

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provisions of this order, and subject also to such alterations (if any) in the plans and sections deposited with reference to this order as the Board of Trade require from time to time before the completion of the works, in order to prevent injury to navigation, the undertakers may, on the lands or foreshore appropriated by them, or taken by them under this order, and in the lines and situations, and according to the levels shewn on the deposited plans and sections (so far as the same are shewn thereon), and within the limits of deviation shewn on those plans, make and maintain the pier and works authorized by this order." By sect 5: "The pier shall be constructed of open pile work, and shall commence at or near the northern extremity of a certain street in *Yarmouth* called *Bank Street*, and shall extend seaward for a distance of 700 feet, or thereabouts."

The deposited plans shewed that the pier was to be constructed so that its floor, which was of planks, should be in immediate contact with the sea-wall at the north end of *Bank Street*, and of a width exceeding that of the street, and overlapping the street both on the east and west. The order contained no reference to the existence of any right of access by any persons from *Bank Street* to the beach, and no other right of access was substituted for that right, if it existed. The order authorized the undertakers to levy (*inter alia*) the following tolls:—

"For any passenger or other person who shall land on the pier from, or embark from it on board of any ship, vessel, packet, or passage boat, for each time any sum not exceeding 3*d*.

"For every person who shall use the pier for the purpose of walking, for exercise, pleasure, or any other purpose, except for embarking or disembarking, for each time any sum not exceeding 2*d*."

By an indenture dated the 12th of July, 1875, and made between Her Majesty of the first part, the Board of Trade, acting in exercise of such of the powers conferred by the Acts 10 Geo. 4, c. 50, and 15 & 16 Vict. c. 62, or any other Act, as were transferred to the Board of Trade by the *Crown Lands Act*, 1866, of the second part, and the Plaintiffs of the third part, it was witnessed that, in consideration of £5 by the Plaintiffs paid to the

Board of Trade, the Board, on behalf of Her Majesty, did thereby grant unto the Plaintiffs and their successors so much of all that piece of land being part of the foreshore and bed of the sea below high-water mark as would be occupied by the pillars and supports of the pier to be constructed under the provisions of the *Yarmouth (Isle of Wight) Pier Order*, 1874, and extending 700 feet or thereabouts in a northerly direction from *Bank Street, Yarmouth, Isle of Wight*, "which said piece of land is intended to be delineated in the plan annexed to these presents, and therein coloured red" (except nevertheless and always reserving to the Queen, her heirs and successors, and to the Board of Trade, a right of re-entry in certain events), to hold the premises thereby granted unto and to the use of the Plaintiffs, their successors and assigns, for ever, paying unto her Majesty, her heirs and successors, the yearly rent of 1*s.* if demanded.

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In the plan annexed to this deed the pier was shewn as being in immediate contact with the north end of *Bank Street*, and the whole site of the pier was coloured red, thus implying that the high-water mark coincided with the face of the sea-wall at the north end of the street, though in some of the deposited plans the high-water mark was shewn as being some feet to the north of the face of the sea-wall.

This was the trial of the action.

Argument

*North*, Q.C., and *D. L. Alexander*, for the Plaintiffs:—

We deny that the alleged public right of way or access from *Bank Street* to the sea-shore ever existed. But, if it did, the necessary result of the construction of the pier according to the deposited plans was to destroy it. We have only done what our parliamentary powers authorized us to do. We allowed the public at first to pass through the openings in the fence of the pier to and from the shore, but this was only a permissive license which we were entitled to withdraw at any time. We withdrew it and closed the openings, because we found that boatmen landed passengers on the shore, and our tolls were evaded.

*Fischer*, Q.C., and *T. A. Roberts*, for the Defendants:—

There are no express words in the provisional order extinguish-

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ing this right of way. A public right of way can only be extinguished by express words. It cannot be supposed that it was intended to extinguish a public right of way without providing a substitute for it: *Rex* v. *Tippett* (1); *Rex* v. *Birmingham Canal Company* (2). The Plaintiffs have no power to take land compulsorily.

[FRY, J.:—Sect. 3 of the provisional order authorizes them to "appropriate" such of the lands and such parts of the foreshore as are shewn in the deposited plans.]

That does not give them the fee simple of the land or foreshore; it only confers on them the right to build their pier over it.

[FRY, J., referred to the parcels in the conveyance of the 12th of July, 1875.]

Some of the deposited plans shew that there is a gap between high-water mark and the sea-wall at the end of *Bank Street*. The Board of Trade could not confer any rights on the shore above high-water mark.

[FRY, J.:—If the pier is constructed in part over land which did not belong to the Crown, must I not, as the Plaintiffs are in possession, assume as against you that the owner of that land has given his consent. The Legislature have given the Plaintiffs a right to erect the pier; the question is, whether they have authorized them to obstruct your right of way?]

The provisional order says nothing about stopping up the way.

[FRY, J.:—The right which you now claim is a different one from your old right; the existence of the pier as shewn by the deposited plans seems to be physically inconsistent with your old right, and I can see nothing in the provisional order giving a substituted right.]

Our access to the shore was practically not interfered with till the Plaintiffs erected the gates; we could not have brought an action till they did that. At any rate, our right is saved by sect. 11 or by sect. 14 of the *General Pier and Harbour Act*, 1861 (24 & 25 Vict. c. 45) (3).

(1) 3 B. & A. 193.
(2) 2 B. & A. 570.
(3) Sect. 11: "Nothing in this Act contained shall extend to abrogate or pre-

A right of way is not a "hereditament" within the meaning of the *Lands Clauses Consolidation Act: Pinchin* v. *London and Blackwall Railway Company* (1). A public right of way is a right in gross, not a mere easement: *Rangeley* v. *Midland Railway Company* (2). In *Simpson* v. *Scales* (3) an Act for inclosing waste lands through which a navigable river flowed empowered commissioners to set out such public and private roads and ways as they should think necessary, and directed that all roads and ways not so set out should be deemed part of the lands to be allotted, and it was held that an ancient towing-path on the bank of the river, though not set out by the commissioners, still subsisted, and *Rooke*, J. in giving judgment, said, "This Act contains the usual saving of the King's rights . . . Supposing, therefore, that the towing-path could be considered as falling within the words of the Act, I should still be inclined to hold that the right was saved by the exception in favour of the King, who is the protector of all these public rights."

*North*, in reply, with reference only to the effect of sect. 11 of the Act of 1861:—

Sect. 11 refers to rights of the Crown in relation to property

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judice any estate, right, title, interest, prerogative, royalty, jurisdiction, or authority of or appertaining to the Queen's most excellent Majesty, her heirs or successors, in right of her Crown, or of her Duchy or County Palatine of Lancaster."

Sect. 14: "The promoters shall not, by any provisional order under this Act, or by any Act of Parliament confirming such order, be authorized to do any act, matter or thing which shall prejudice or affect any right, privilege, power, jurisdiction, or authority acquired by or given or reserved to any person or persons by Royal Charter, by prescription, or by any local or personal or private Acts, for the purpose of executing any works such as are contemplated by this Act, or for the management and conservancy thereof, or for protecting the navigation of any tidal waters or navigable river, or for making any river navigable, or otherwise improving, maintaining, or continuing the navigable passage thereof, or any works connected therewith, or which shall or shall tend to prejudice or injuriously affect the access to or passage from any quay, pier, harbour, basin, dock, or inland navigation, or the channels or passages thereof, or leading thereto or therefrom, or the use or enjoyment of any quay, pier, harbour, basin, dock, or inland navigation, without the consent in every case of such person or persons."

(1) 5 D. M. & G. 851. 1 Jur. N. S. 241

(2) Law Rep. 3 Ch. 306, 311.

(3) 2 B. & P. 496.

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belonging to it, not to its rights of a public nature. In *Simpson* v. *Scales* (1) the decision of the Court was in effect that the towing-path formed part of the navigable river, and the soil of a navigable river is vested in the Crown in its public character. The observations of Mr. Justice *Rooke* were only *obiter dicta*. Moreover, a general saving clause which is repugnant to the body of an Act is void: *Case of Alton Woods* (2). If sect. 11 has the meaning attributed to it, it would have been physically impossible for us to do that which we are authorized by our special Act to do. The provisions of a general Act are controlled by those of a subsequent special Act: *Attorney-General* v. *Great Eastern Railway Company* (3).

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FRY, J., after stating the nature of the action, continued:—

It has been agreed that I shall try in the first place this question: Assuming the right asserted by the Defendants to have existed before the extraordinary provisions were passed under which the Plaintiffs claim, does that right still exist? In other words, has the right been taken away by the statutory powers conferred upon the Plaintiffs? I am of opinion that it has been so taken away. [His Lordship then stated the facts, and continued:—]

The result of the construction of the pier was this, that, whereas persons had been in the habit of getting from the sea-wall at the end of *Bank Street* on to the shingle, there was now to be placed, on the very space through which every person so doing had to pass, a permanent structure of planks through which persons could not pass. There was a physical impossibility in the persons who had exercised the alleged right continuing to exercise it in the manner in which they had previously done. The exercise of the right and the existence of the pier were absolutely inconsistent.

It is said that I must assume that a substituted right was created, and the substituted right suggested is this, for the public passing down *Bank Street* to walk over that portion of the pier which adjoins the street, to go east or west, and to descend from

(1) 2 B. & P. 496. (2) 1 Co. Rep. 40 b.
(3) Law Rep. 7 Ch. 475; Ibid. 6 H. L. 367.

the sides of the pier on to the beach or shingle adjoining. Now, in the first place, it is to be observed that that is essentially a distinct right from the old right which is claimed. It is not a right to go from the end of *Bank Street* on to the shingle immediately below, but a right to go from the pier on to the shingle east or west of *Bank Street*. And, further than that, I can find in the provisional order no intention to create that substituted right.

In the next place, I find this, that the existence of such a substituted right would be inconsistent with the express provisions of the order, because the order (which is confirmed by the subsequent Act) enables the Plaintiffs to levy a toll upon every person walking on the pier. Persons walking on the pier for the purpose of landing from or embarking on board of any ship or vessel are to pay a toll of 3*d.*, and persons walking on the pier for any other purpose are to pay a toll of 2*d.*; so that every person who walks on the pier is to pay something. Now a right for the public to walk east and west on the pier, paying nothing, is inconsistent with the right of the owners of the pier to charge every person who walks on it something. It appears to me, therefore, that the provisional order, confirmed as it is by Act of Parliament, has by necessary implication deprived the public of this alleged right, if it ever existed.

One or two arguments have been adduced which I desire to notice. In the first place, it is said that an Act of Parliament cannot take away a public right of way except by express words. For that proposition no authority has been cited, and, in my opinion, it is not maintainable. I think that, when the Legislature clearly and distinctly authorize the doing of a thing which is physically inconsistent with the continuance of an existing right, the right is gone, because the thing cannot be done without abrogating the right.

In the next place, it is said that there are certain saving clauses in the general Act of 1861, under which this provisional order was made, which preserve the alleged right of the Defendants. These are sects. 11 and 14. [His Lordship read sect. 11.] It is said that the right of the public to get from the end of *Bank Street* on to the shingle was a right "appertaining to Her Majesty in right of her Crown." In the first place, I do not think it was.

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I think that the rights referred to in that section are rights of property, or rights in the nature of property, belonging to the Crown as Crown property. But in the next place, it is to be observed that this section is only a saving clause in a general Act, and it appears to me that, even if it would in itself have covered the alleged right, and have protected it, yet being, as I have pointed out, physically inconsistent with the doing of the thing which is authorized to be done by the special Act, that saving clause would cease to be operative. I think the law is clearly laid down by Lord *Coke* in the *Case of Alton Woods* (1), that a saving clause in an Act of Parliament which is repugnant to the body of the Act is void. In the next place, it is to be borne in mind that where there are provisions in a special Act which are inconsistent with the provisions of a prior general Act the provisions of the general Act must yield to those of the special Act. The case of *Attorney-General* v. *Great Eastern Railway Company* (2) is an authority for that, if authority was wanting. I believe that many other authorities would be found if they were looked for. It appears to me that it was impossible to construct the pier, which is authorized by the special Act, without interfering with the alleged right of way of the Defendants, and, therefore, I think that right could not be saved without abrogating entirely the operative clauses of the special Act.

The other section of the Act of 1861 which has been relied on is sect. 14. [His Lordship read it.] It is said that the words, "for the purpose of executing any works," and so forth, do not apply to a right acquired or given by prescription or otherwise. It appears to me quite plain that they do, and they are words limiting the right acquired by Royal Charter or prescription which is saved. The right now in question is not a right given for any of the purposes therein named. That is not in dispute. It is plain to my mind that the general scope of the 14th section is this—where there are two bodies having similar rights in respect of harbours, or quays, or piers, or enterprises of that description, the right already given was not to be interfered with by the right subsequently given. That does not apply to the present case, and I therefore reject that argument.

(1) 1 Co. Rep. 40 b. (2) Law Rep. 7 Ch. 475; Ibid. 6 H. L. 367.

From what I have said it follows, in my judgment, that, if the alleged right of way was proved to have existed, I could not give effect to it, and therefore it would be a waste of time for me to investigate the question whether the right did or did not exist. The Plaintiffs are entitled to the perpetual injunction which they claim, and I give them 1*s.* damage for the injury done to the gates by the Defendants. The Defendants must pay the costs of the action. I dismiss the counter-claim with costs (1).

Solicitors for Plaintiffs: *Cunliffe, Beaumont, & Davenport,* agents for *F. Blake, Newport, Isle of Wight.*

Solicitors for Defendants: *Ford & Ford,* agents for *R. W. Ford & Son, Portsmouth.*

(1) The Defendants gave notice of appeal from this decision, and the appeal was duly entered, but in November, 1878, the Defendants withdrew it.

C. A. 1878 Nov. 20; Dec. 18.

## *In re* FLORENCE LAND AND PUBLIC WORKS COMPANY. *Ex parte* MOOR.

*Company—Debentures—Bond binding the Estate, Property, and Effects of the Company.*

Pat 861-7
12 Ch D 709
713
15 Ch D 467
469, 472
16 Ch D 495

The articles of a company incorporated for the purpose of acquiring land in *Florence* and building thereon, and selling, mortgaging, or leasing the same, gave power to the directors to borrow money by mortgage of any part of the company's property, or by "bonds, debentures, or mortgage debentures," which should entitle the holders to be paid out of the moneys, property, and effects of the company *pari passu*.

The company issued instruments called "obligations," which were expressed to be made under the power of their articles, by which they bound "themselves, their successors, and assigns, and all their estate, property, and effects," to repay the sums mentioned therein at a future date, with power to redeem a certain portion of the obligations at intermediate times:—

*Held*, that, reading the obligations with reference to the articles of association, they constituted a charge on the property of the company, subject to the power of the directors to dispose of any part of such property in the ordinary course of their business.

*Per James*, L.J.:—Upon the construction of the obligations themselves, without reference to the articles, except as to whether they were *ultrà vires*, there was sufficient to constitute a charge upon the property of the company.

Whether the *Judicature Act*, 1873, s. 10, has affected the power of companies to charge their after-acquired property as against the other creditors of the company, *quære*.

The decision of *Hall*, V.C. (following *Norton* v. *Florence Land and Public Works Company* (1)) reversed.

Statement.

THIS was an appeal from an order of Vice-Chancellor *Hall* made in Chambers, on a summons taken out by the executors of *Henry Moor*, who was the holder of fifty-four debentures or obligations of the *Florence Land and Public Works Company, Limited.*

The company was registered in January, 1866. The memorandum of association was dated the 25th of January, 1866. The objects of the company were stated to be, among others,

To purchase a certain concession of freehold land and buildings in the city of *Florence.*

To execute the works authorized by the concession.

(1) 7 Ch. D. 332.

To acquire from time to time by purchase, lease, or otherwise, lands, buildings, or other property in the Kingdom of *Italy*.

To sell, lease, charge, or mortgage, or otherwise dispose of the lands, buildings, sites for buildings, and works.

To borrow money and to issue transferable bonds to bearer or otherwise, debentures and mortgage debentures based on all or any of the assets, real or personal, of the company.

The capital of the company was to be £500,000 in 25,000 shares of £20 each.

The articles of association, which were referred to in the argument, were the following :—

Art. 88. "In order to the management of the affairs and business of the company, the directors shall have power at all times, in the name and on behalf of the company, to do the following things (among others),

"(9.) They may let, mortgage, sell, transfer, or otherwise dispose of, either absolutely or conditionally, and in such manner and upon such terms and conditions in all respects as they think fit, any of the property or securities of the company, and may accept payment or satisfaction of any property so disposed of in fully paid up or other shares, or partly in shares and partly in cash, or in such other manner as the directors deem expedient.

"(12.) They may from time to time raise or borrow, in the name or otherwise, on behalf of the company, such sums of money as they may from time to time think expedient, either by way of mortgage of the whole or any part of the property of the company, or any bonds, debentures, or mortgage debentures, or in such other manner as they deem best.

"(13.) They may, for the purpose of securing the repayment of any money so borrowed with interest, make and carry into effect any arrangements which they deem expedient by conveying any property to trustees or otherwise."

Art. 117. "Every bond, debenture, or mortgage debenture issued by the company for securing money borrowed, shall be by deed under the common seal of the company duly stamped, and shall, so far as may be, be framed and prepared as to be capable of transfer; but this shall not extend to prevent or restrain the directors from creating or issuing any scrip or provisional certificate in

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anticipation of the issue of any such bonds or mortgage debentures."

Art. 118. "Such bonds, debentures, or mortgage debentures shall, so far as may be, be so framed and prepared that the respective holders of or other persons entitled to such bonds or mortgage debentures shall, proportionally according to the amount of the moneys secured thereby, be entitled to be paid out of the securities upon which the same are respectively charged, and the moneys, property, and effects of the company, the respective sums in such bonds or mortgage debentures mentioned and thereby intended to be secured and the interest thereon, without any preference or priority one above another by reason of priority of date of any such bond or mortgage debenture, or otherwise howsoever."

Art. 119 provided for the keeping a register of bonds, debentures, and mortgage debentures.

Art. 121. "The directors may and shall from time to time make such further rules and regulations as they may think proper with respect to the form of such bonds or mortgage debentures and the issue thereof, and as to the mode of transfers of the same and the registration of such bonds or mortgage debentures and the transfer thereof, and for giving due effect in all other respects to the above provisions as to bonds and mortgage debentures, and full security to the holders of and persons interested in the same."

In pursuance of these powers the directors issued debentures of £100 each, which were in the following form:—

"Obligation.

"Total issue £250,000.

"No. —— £100

Pow 681

"The *Florence Land and Public Works Company, Limited,* in consideration of the sum of £100 advanced and lent to them by , do hereby, in pursuance and under the power of their articles of association, bind themselves, their successors, assigns, and all their estate, property, and effects, to pay to the said , or bearer, on presentation of this bond at the registered office of this company in *England*, the said principal sum of £100 on the 24th day of June, 1878, and also interest on the said principal sum of £100 until paid at the rate of £6 per cent. per annum, at the times and places mentioned in the coupons

attached hereto: Provided also, and it is hereby declared, that this bond is issued subject to the condition and scale indorsed hereon.

"Given under the common seal of the company, by order of the board, the 24th day of June, 1868."

The following was the condition indorsed:—

"The company reserves the right of redeeming this and as many other obligations as the directors may think fit in each year, commencing with the year 1871, but in no case shall the amount of obligations to be redeemed in any one year be less than the amount specified in the scale hereunder written; the obligations to be redeemed in each year shall be determined by drawings at the office of the company in the presence of two directors and a notary public, on the 1st day of May in each year, and shall become payable with the accruing interest on the 30th day of June following.

"The drawings on the

| | | | |
|---|---|---|---|
| "1st May, | 1871, | will be for | £10,000 |
| „ | 1872 | „ | 15,000 |
| „ | 1873 | „ | 20,000 |
| „ | 1874 | „ | 25,000 |
| „ | 1875 | „ | 35,000 |
| „ | 1876 | „ | 40,000 |
| „ | 1877 | „ | 50,000 |
| „ | 1878 | „ | 55,000 |
| | | | £250,000." |

The coupons attached to the instrument were in the following form:—

"*The Florence Land and Public Works Company, Limited.*

"Debenture No. —— £100.

"Interest Warrant for Three Pounds.

"Payable 24 December, 1876, on presentation at Messrs. *Robarts, Lubbock, & Co.*, 15, *Lombard Street, E.C.*

"£3 0 0. "*J. F. Cockran,*

"Secretary."

The company having been ordered to be wound up, the execu-

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tors of Mr. *H. Moor*, as the holders of fifty-four of these debentures, took out a summons in the winding-up before Vice-Chancellor *Hall*, asking that it might be declared "that the said mortgage debentures or obligations issued by the above-named company were a charge upon all the property and effects of the said company, and that they might be at liberty to inspect the books and documents relating to the property of the company in the possession of the official liquidator."

The Vice-Chancellor, considering himself bound by the decision of the Master of the Rolls in the case of *Norton* v. *Florence Land and Public Works Company* (1), decided that the debentures or obligations did not operate as a charge upon the estate, property, and effects of the company, and made no order on the application, except that the applicants were to be at liberty, if so advised, to commence an action against the company in respect of the said debentures or obligations; and he reserved further consideration of the application if and when the order should be varied.

From this order the applicants appealed.

Argument.

*Robinson*, Q.C., and *Whitehorne*, for the Appellants:—

The argument in *Norton* v. *Florence Land and Public Works Company* was principally directed to the question whether the land in *Florence* was included in the charge. That question is not now before the Court, but the Court is in effect asked to review the decision of the Master of the Rolls in that case, by which he held that the debentures did not constitute any charge on the assets of the company. We contend, in the first place, that, on the construction of the obligations held by the Appellants, independently of the articles, there is sufficient to create a charge on the property of the company for the time being. It is true that it is called on the face of it an "obligation" and a "bond," but it goes beyond the form and effect of an ordinary bond, because it contains words expressly binding the estate and effects of the company. If the word "charged" had been used instead of "bind," there could have been no doubt that the instrument operated as a mortgage security. What difference is there between "bind" and "charge" when applied to property? *In re General South American Com-*

(1) 7 Ch. D. 332.

*pany* (1); *In re Marine Mansions Company* (2); *In re Panama, New Zealand, and Australian Royal Mail Company* (3). In the coupon attached to the instrument it is called a "debenture."

But our case is made still more plain when we look at the articles of association, under the powers of which the debentures were made, and which are referred to in the body of the instrument. By article 88, sub-sect. 9, the directors are empowered to let, mortgage, or sell any part of the property of the company, which overrides the power of issuing debentures, and enables them to carry on the business of the company independently of the debenture holder; and by the 12th sub-section they have power to issue what are there called "bonds, debentures, or mortgage debentures." These are regulated by articles 117, 118, and 119, and they are all to rank *pari passu*, and not in priority of date. It is plain from the frame of these debentures that they were made in pursuance of this power, and that they are all to rank *pari passu*. They do not interfere with the management of the business of the company by the directors, but bind the assets for the time being of the company: *Bower* v. *Foreign and Colonial Gas Company* (before the Master of the Rolls, Nov. 13, 1877).

[JESSEL, M.R.:—Can a company, any more than an individual, charge its future property? This is not a charge on the "undertaking," as in other debentures, but on the estate and effects. By the *Judicature Act*, 1875, s. 10, the administration of the estates of companies in winding up has been assimilated as to the respective rights of secured and unsecured creditors to the administration of estates in bankruptcy. Would it not be contrary to the policy of the bankruptcy laws that a mortgage security should affect after-acquired property?]

The operation of these debentures is well known to all the creditors of the company, and they deal with it on that footing.

*Dickinson*, Q.C., and *Ingle Joyce*, for the official liquidator:—

These instruments are only personal securities. An ordinary

(1) 2 Ch. D. 337. (2) Law Rep. 4 Eq. 601.
(3) Law Rep. 5 Ch. 318.

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debenture of a company is in the form of a mortgage of the undertaking. The word "obligation" is the old word for a bond, and has a technical signification. If the words "estates and effects" had not been introduced there could have been no doubt that the instruments were only personal securities. What difference do those words make? They are mere surplusage, and only express what would have been the effect on the estates and effects of the obligees without such words. They were probably introduced by analogy to the common form of releases. In all the cases cited the word "charge" was used. The use of the word "debenture" in the coupon can have no bearing upon the question. It is simply a cheque for payment of the interest. The effect of the obligations is not altered by reference to the articles. It is true that the company had power to issue mortgage debentures, but they had also power to issue personal securities, and there is nothing to shew that there is reference to the particular power of issuing mortgage debentures; indeed, the fact that they were made transferable to bearer raises a presumption that they were not intended to be mortgages. If these instruments were mortgages, it would follow that the company could not mortgage or sell any specific portion of their assets without the concurrence of all the debenture holders, which could never have been intended.

Judgment, Jessel, M.R. —

JESSEL, M.R.:—

I cannot say in this case that I disagree with the Vice-Chancellor, for in fact the appeal has been occasioned by his agreeing with a decision of mine in *Norton* v. *Florence Land and Public Works Company* (1); but it should be known in the first place that I had not before me on that occasion the articles of association, nor were they relied on in the argument, and I had to construe the bond or obligation, or whatever it is to be called, as well as I could without any such articles. In the next place I wish to say this, that I adhere to every word I then said, except with respect to a passage at the top line of page 338 in the report. I think there is a slip in that passage, whether made by me or the reporter I cannot say. I ought to have said—and I now think that I intended to say—"themselves, their successors and assigns;"

(1) 7 Ch. D. 332.

and if those words are substituted for the words "estate, property, and effects," the judgment will be found consistent. Having read at the bottom of page 337 all the words, I first dealt with the first half of the sentence, and then in page 338 I dealt with the second half. But, with that correction, I entirely adhere to what I then said. I do not mean to say that other Judges may not differ as to the construction of the bonds standing alone. I have often said that, in the construction of these obscure instruments, no man, whether a Judge or not, has a right to say that he has arrived at the correct conclusion. He has an opinion on the meaning of the instrument, and somebody else may fairly and properly entertain another without saying that those who differ from him are wrong. That I have frequently said, and I only reiterate it because I am not at all sure as to what the opinion of the other Lords Justices may be, and I should not like, by saying that I entirely adhere to what I then said, to imply any disrespect to either of them, or that I do not think they may fairly entertain a different opinion.

But as regards the question we have now to decide, on what appear to me very different materials, I have arrived at a different conclusion from what I did in the case of *Norton* v. *Florence Land and Public Works Company* (1); and I do not think it at all material to discuss whether the conclusion I have arrived at now is or is not consistent with my former decision. The real question we have to decide is on the meaning of a written instrument, which I must say, without wishing to say anything unpleasant as regards the unknown draftsman, I think might have been better drawn. The question we have to decide must be decided, like all other questions of the kind, having regard to the surrounding circumstances under which the instrument was executed, and especially the respective positions of the parties who were the contracting parties, to carry out whose agreement that instrument was executed. Now it does appear to me that every one of the difficulties which I have suggested in the former case, and one other which is very important, namely, that if you read it literally to be a charge it would include the very money raised by the loan, may be got rid of by a fair construction of the articles themselves. In the first

(1) 7 Ch. D. 332.

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place, I think we are entitled to refer to the articles, because on the face of the instrument it is executed in pursuance and under the powers of the articles of association; and I think I shall be able to shew that "in pursuance" has a particular meaning, because there are directions in the articles of association which state what the form of the bond shall be, and although they have not been literally followed out by putting the words required by the articles in the bond, I think when a bond is executed in pursuance of them it does send us back to the articles of association to shew us what ought to have been done.

Now the memorandum of association tells us this, that the company in question, which is a limited company, is established for certain objects. First of all, they are to buy a concession in *Florence*, and then to execute works under that concession. It is a concession for building houses and making new streets, I believe. Then to acquire from time to time by purchase, lease, or otherwise any others in *Italy*. Then there comes this: "To sell, lease, charge, mortgage, or otherwise dispose of the lands, buildings, sites for buildings, and works erected or executed, or in process of completion by the company, or their agents, on such terms as the company may think fit." Then, "To borrow money and to issue transferable bonds to bearer, or otherwise debentures and mortgage debentures based on all or any of the assets real or personal of the company." Now, speaking for myself only, and knowing as I do the habits of conveyancers and the mode in which legal instruments are drawn in this country, I am never very much embarrassed by the suggestion that when a man uses ten words where two would do, I am bound to affix a separate meaning to every word of the ten. I do not consider myself so bound, and the same principle applies to the use of three words instead of two. From my own experience and my knowledge of precedents in former times when conveyancers were much worse in that respect —I mean in redundancy—than they are now, I am satisfied that it is by no means a sound or necessary rule of construction, and at the same time I am far from saying that it does not afford some argument. It affords, to my mind, a much greater argument when we find it in a letter or in an informal, untechnical document not drawn by a conveyancer than it would in a formal, technical

document drawn by a conveyancer. That is the impression on my mind, and the principle on which I decide cases.

That being so, I do not feel myself bound to put a different meaning on the words "debentures" and "mortgage debentures" used in this article. I do not know what the difference can be if you get "bonds," "debentures," and "mortgage debentures," and I do not feel myself concerned to inquire.

Then I go to the 87th article, which is a general power to the directors such as is usually found. "The directors shall have the management of all the affairs and business of the company, and may exercise all such powers of the company as are not by the Acts for the time being regulating joint stock companies or by the articles of association declared to be exercisable," by somebody else. Then the 88th is this, and I first of all refer to the introductory words, which override all the sub-sections, because I attach great importance to them. "In order to the management of the affairs and business of the company the directors shall have power at all times in the name and on behalf of the company to do the following things." They are all subordinate things to the management of the affairs and business of the company, by which I understand the management of the affairs and business of the company as a going concern. That is what they contemplate, and nothing else. [His Lordship then read the 9th, 12th, and 13th sub-sections of the 88th article, and continued:—]

The next clauses are those which relate to bonds, debentures, or mortgage debentures, and the 117th is: "Every bond, debenture, or mortgage debenture issued by the company for securing money borrowed shall be by deed under the common seal of the company duly stamped, and shall, so far as may be, be so framed and prepared as to be capable of transfer." Then there comes a clause which is material—the 118th: "Such bonds, debentures, or mortgage debentures shall, so far as may be, be so framed and prepared that the respective holders of or other persons entitled to such bonds or mortgage debentures shall proportionably, according to the amount of the moneys secured thereby, be entitled to be paid out of the securities upon which the same are respectively charged, and the moneys, property, and effects of the company the respective sums in such bonds or mortgage debentures mentioned and

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thereby intended to be secured, and the interest thereon, without any preference or priority one above another by reason of priority of date of any such bond, or mortgage debenture, or otherwise howsoever." Now here again I am not going to criticise this 118th article, and to say that the securities mean special securities hypothecated without respect to date. That would be rather an extravagant interpretation, but it does shew this, that where the bonds or mortgage debentures charge the moneys borrowed or the moneys, properties, and effects of the company, they are to take *pari passu.* That is quite plain; it is to be so in every case. They shall be framed in that way. Everybody, therefore, taking a debenture, or mortgage debenture, or a bond, under this clause knows it is to rank, not according to date, but *pari passu.* The 119th says there is to be a register kept, and the 121st, which empowers the directors to make further rules and regulations, shews that though they may make further rules they are not to get rid of prior rules, but, on the contrary, they are to give further effect to them.

Now when you look at all these clauses together they amount to this, as I understand them. You may bargain under one section for a special mortgage in the ordinary way of a particular property, and that will get priorty, having regard to the 9th and 13th sub-sections of the 88th article, or you may borrow money under the 12th section, securing it by a bond or debenture. And then the directions of the subsequent articles of association apply, and especially those clauses which I have read, the result of which is, that when you issue a bond or debenture under those clauses you issue an instrument which, being made in pursuance of the clauses, entitles the holders to some security on the money, property, and effects of the company, and entitles them to hold such security irrespective of the date of their bonds equally amongst themselves as regards the loan for which the debentures are given as security. I said "some security." Now what kind of security? Here again I think when you look at the nature of the company, the duties the directors had to perform, and the terms in which the articles of association are couched, you may arrive fairly at the conclusion that it means this kind of security—that the bond or debenture shall be a security on the property of the company as a

going concern, subject to the powers of the directors to dispose of the property of the company while carrying on its business in the ordinary course. It is to be observed, as I said before, that the whole of the sub-sections in clause 88 are subordinate to the introductory words—that it is to be in the management of the affairs and business of the company. It is therefore inconsistent to suppose that the moment you executed a bond or debenture you paralyzed the company and prevented it carrying on its business, for if you read the words to mean a specific charge on the property of the company, then, of course, no practical use could be made of the money borrowed, because that would become the property of the company, and anybody with notice would be liable on that view to repay it to the mortgagee or debenture holder. That would be one extravagant result. Another would be this, that if the company is formed to build and to let and mortgage its property, you can neither lease nor mortgage without the assent of every individual bond or debenture holder, which again, to my mind, would be extravagant. But if you read it as making a charge only to this extent, subject to the powers of the directors whilst they are carrying on the business, then if they make default in payment of the principal or interest a creditor can apply to a Court of Justice for a receiver and stop them from going on; but subject to that they carry on their business as usual, leaving the creditor to his remedy in case of default or in case of a total winding-up. That appears to me to be a rational view and to reconcile all the provisions of the articles of association. As I said before, whether it is a right view or not must depend on the Judge who reads the articles.

Now, then, if that is the right view of the articles, we have here an obligation made in pursuance and under the power of the articles. If it is made in pursuance it is made in obedience to those directions I have read, which make it in the first place a charge on the property of the company, which make it in the second place a *pro ratâ* charge as between the debenture holders, and which make it in the third place subject to the powers of the directors to carry on the business and to let, sell, or mortgage as they think fit in the ordinary course of business until the creditor in some way or other interferes.

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That being so, is there anything in the words of the bond which shew a contrary intention? I cannot say that there is, but so far as they have any meaning, or specific meaning at all, they aid the contention.

In the first place we find that the bond is part of a total issue of £250,000. It is a £100 obligation and it is part of a total issue. That obviously refers to the amount for which it is to rank *pari passu*. Then it goes on to say that the company "bind themselves, their successors and assigns, and all their estate, property, and effects." We get a meaning to the words "estate, property, and effects" when you look at the articles, for the articles say, "upon which the same are respectively charged, and the moneys, property, and effects of the company." Instead of "the moneys, property, and effects of the company" in the articles, we have "estate, property, and effects of the company" in the bond. Still that is to be a bond in pursuance of the articles. Now I agree that it is quite possible to put two meanings on those words. It is quite possible to say that they meant the particular things intended to be referred to in the articles. My opinion is that, looking at the words of the bond and the terms of the articles, they do mean to charge, in the way I have mentioned, the estate, property, and effects of the company. Then it goes on to say that this bond is issued subject to and in accordance with the conditions and scale indorsed thereon, and there is a provision for drawings, and the bonds are to be paid irrespective of date at certain times after the drawings. The obligation is to be redeemed and paid at the offices of the company, and so forth, and shall be payable with the accruing interest on the 30th day of June following, that is, irrespective, as I have said before, of date, because the date at which the obligation becomes payable is a later date, the 24th of June, 1878. Therefore it would become payable under this at an earlier date, or if it is the last bond left not drawn at the day mentioned. It appears to me, therefore, to shew that as these are to be drawn and to be payable according to the drawings and irrespective of the date named in the obligation, as I have said before, it is a confirmation of the articles so far that they are *inter se* to rank *pari passu*. That is quite intelligible when you throw them all into a box and draw them, having all

an equal chance of being drawn, but it is not intelligible if they are to rank according to date.

Then there is one other observation on the thing itself. Although it is called an obligation in one part and a bond in another, it is called a debenture in the coupon attached thereto, which is referred to in the instrument. The bond before me has a coupon attached in this form: "*Florence Land and Public Works Company, Limited.* Debenture No. 212. Interest warrant £3," and so forth. When I turn back to the obligation, I find it is numbered 212, so that the thing which is called in the body an obligation or a bond, in the coupon which is referred to in the body, which is an instrument of even date, and which is almost incorporated with it, and certainly can be referred to for the purpose of construction, is called a debenture. When I look at the articles I find that bonds and debentures are to be secured in the same way. They are all to be secured, as I understand, by some charge on some of the property of the company. Therefore, reading the bond, as I do, in connection with the articles of association, so far from finding anything in the bond antagonistic to the construction which I now think the true one, it seems to me that the bond rather confirms that construction, and therefore that it should be held, as I have said, to be a charge on the property of the company.

There are some other questions of more or less difficulty, which will have to be discussed hereafter, some of them of very considerable difficulty. One is the effect of the *Judicature Act* on these securities. Upon that I intimate at present no opinion, because we intend to reserve it. Another question will be its effect upon charges on property abroad, which require other formalities essential to the validity of the charge. On that I express no opinion, I merely intend to decide, so far as I am concerned, that they do charge what I have expressed as regards the property of the company, preserving the right of any person to dispute as to what future property is or is not comprised in the debenture, and also the question which has been already mentioned as regards other property which may or may not be affected by the debenture, quite independent of the fact of its being future acquired property.

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JAMES, L.J.:—

This case is nominally an appeal from an order of the Vice-Chancellor *Hall*, but in reality it is an appeal from a decision of the Master of the Rolls which the Vice-Chancellor *Hall* conceived himself bound to follow, and the only question determined by the Vice-Chancellor *Hall*, and the only question which appears to me and the other members of the Court which we have now to consider, is the decision of the Vice-Chancellor *Hall* on that preliminary point, after the settlement of which there seem to be a great many questions, some, at all events, affecting the right of the Plaintiff.

Now the question that was so decided at the Rolls, which decision was followed by Vice-Chancellor *Hall*, was that the document in fact was nothing but a bond, and did not create any charge whatever—I mean according to the true legal construction of the document. The Master of the Rolls has now said that, reading the bond with the articles of association, and with a particular clause in the memorandum, he is now satisfied that the bond was something more than a bond, and did purport to create, so far as the parties could create, a charge on the assets of the company—a specific charge. I am bound to say that, according to my view of the instrument itself, reading it without any reference whatever to the articles, and only referring to the articles for the purpose of seeing whether it was *intra vires* or not, but reading this instrument and judging of it by what is contained within the four corners of it, I, with all deference to the contrary opinion, should not have had any hesitation myself in saying that the company did mean to give as far as they lawfully could, and that the party who took the bond did suppose he was getting something very different from a common money bond of an individual. It is a cardinal rule of construction that all documents are to be construed *ut res valeat magis quam pereat.* But if this is to be construed as a mere money bond, the person who was lending money for the purposes of the company, instead of being in a better position than an ordinary creditor—instead of getting any security whatever for his money—would be in a worse position than the commonest ordinary creditors of the company; because, whereas a man lending £100 to the company would be immediately entitled to sue for it as a debt,

this man was simply lending £100 to the company with the payment of it postponed, possibly to the year 1878, the obligation being in 1871, and with only a chance of being paid if it should be drawn among sums comparatively small to be paid off year after year. Now it appears to me that it could scarcely be possible that any human being lending money could suppose that he was lending money without any security at all, or that the company could suppose that they were getting money without any security. When people lend money to persons who sell goods and have dealings of that kind, they do it upon the credit of the company or the person, but when a man is lending money for the purpose of carrying on business, the ordinary expectation of the man lending, and the intention of the person borrowing, is that he should have some security upon the property in and for which the money is to be laid out. This being the case of a loan of money for the purpose of the company, the company give a document called an obligation, which upon the face of it refers to a total issue of debentures amounting to £250,000 to be drawn, and then goes on to say they "do hereby bind themselves, their successors and assigns, and all their estate, property, and effects.' Now they had power to bind all their assets—they had power to borrow money charging their assets. I must give some meaning to these words. I do not consider these words merely idle conveyancing surplusage, because it appears to me that they were put in expressly for the purpose of doing something beyond the mere bond. They never would have been inserted if this instrument was to be nothing but an I. O. U. or an acknowledgment that a certain sum of money was lent and was to be repaid. It seems to me that this instrument, with all these formalities upon it, would on that view have been a very idle piece of paper; and if the company intended when they issued it—as of course they did—to induce people to advance money upon it, they would, as between them and the person lending the money, in my opinion, have been committing a very gross fraud. I therefore, with great deference, cannot withdraw from what I said in the course of the argument, that I read those words, "bind themselves, their successors and assigns, and all their estate, property, and effects," to mean "for the purpose of giving a security for the repayment of the £250,000 *pari*

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*passu* to the holder of this and of the others we charge, so far as we can, all our estate, property, and effects, to pay the same." It seems to me that the word "charge," the word "bind," and the word "oblige," whatever may be the ordinary use by conveyancers of one or the other, in the English language and in legal language mean the same. To "bind" means to charge, to "charge" means to bind, "oblige" means to charge or bind —all these words are absolutely, in my opinion, synonymous.

Then what is the meaning of binding the estate, property, and effects of such a company as this? In my opinion, the reasonable meaning, the only meaning which the persons who took it would have attached to it, was, that the words "estate, property, and effects" were in fact exactly equivalent to the word "undertaking," which we find in the other cases, that is to say, it was to be, so far as the company could make it, a special charge upon the assets of the company, the assets which would be forthcoming at the time when the charge was to be made available; it was to be a special charge upon the assets in priority to the general creditors of the company. It appears to me there is nothing wrong in that; because the things are given for money lent, and therefore the company and the creditors of the company have had the benefit of the money. If the money has been laid out in buying or improving estates, why should not the persons who have given the money for the purpose of buying the land, or of erecting buildings upon the land, have a charge of this kind if the law allows it to be done? I am of opinion that the law does allow such a company as this to charge its undertaking, meaning by "charging the undertaking" charging the assets for the time being. I therefore am bound to express my opinion that the company was not guilty of any fraud, that it was not guilty of any intent to take in people by representing that they could give them a security when they were only putting them under an obligation not to sue for a certain number of years for the money they were lending. If the company did not mean to do that, but did mean to give a security, they have used the words which were calculated to make them honest people, that is to say, to give a charge by way of priority to the persons whose money they were borrowing for the purposes of the company. Therefore I am of opinion

that in this document these words were not surplusage, but were used *bonâ fide*, and were intended to have an effect which is capable of being given to them in the way suggested, namely, by creating a charge upon the assets for the time being. Of course that would leave them masters to deal with the property as long as the company remained a going concern, just as Lord Justice *Giffard* said in the case before him, the company being a company capable of buying property, selling it, disposing of it, and making specific mortgages upon it, that they were to go on doing that according to the constitution of the company, all which the persons lending money must have known. Reading it, as I do, as a charge upon the assets for the time being of the company, that would not in the slightest degree interfere with the company carrying on the business for which it was incorporated. Of course, whether this would be a charge upon the land in any particular country as to which there are special laws, and what particular assets would be included in it, may raise questions, and whether any difficulty may arise under the *Judicature Act;* whether the Plaintiffs have got any title at all—for I believe there are some objections to their title to begin with—all those questions are reserved, and the only thing declared is that the instrument did effect a charge upon the assets of the company.

THESIGER, L.J.:—



The only question which we are now called upon to determine is whether a certain instrument in writing constitutes a specific charge upon—to use the language of the instrument itself—"the estate, property, and effects of the company." That it does so has been contended in the argument on the part of the Appellants, upon two considerations; first, upon a consideration of the instrument itself apart from the articles of association to which it undoubtedly refers; and, secondly, upon the construction of the instrument in conjunction with those articles. It is unnecessary to give any opinion upon the first of those two contentions, although it must not be argued from my silence upon the point that I in any way dissent from the views which have just been expressed by the Lord Justice *James*. But, finding, as I do, the instrument which I have to construe referring to another document, I prefer to

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arrive at my decision upon the construction of the instrument by looking at the document to which it refers, and endeavouring to see what is the light thrown by that document.

Now, I find by the articles of association that the company has power to borrow money by (amongst other modes) bonds, debentures, or mortgage debentures. I do not care to inquire very nicely as to what may be the meaning to be attached to those three terms, although I am not prepared to dissent from the argument which has been addressed on the part of the Respondents to the effect that bonds and debentures do primarily import a personal liability only. Where we find in an instrument such as that which we have to construe in this case, words pointing to the instrument being a bond or being a debenture, if we had nothing else to throw a light upon the meaning of the instrument, I do not dissent from the argument that *primâ facie* we ought to assume that the instrument constitutes a personal liability only. But from the 118th clause of the articles of association it appears to me clear, that this particular company contemplated that it might issue bonds or debentures, or mortgage debentures, importing and carrying with them not merely a personal liability on the part of the company, but also a specific charge upon the property of the company.

Now, in the light of that consideration we have to look at the wording of the instrument itself. Attention, of course, has been called to the fact that in its heading it is termed an "obligation," a word synonymous with "bond," for that originally was the word by which the law denominated what we now call a bond. But, on the other hand, the argument that because it is called an "obligation" or a "bond" it constitutes only a personal liability, is at once removed as soon as we have arrived at this fact, namely, that the company was contemplating the issue of bonds or debentures which might carry with them a charge upon the land. That at once disposes of any argument derived either from the use of the term "bond" or the use of the expression "bound." But apart even from the clauses of the articles of association, I should be of opinion that much weight should not be given to the mere use of the term "bond," or "obligation," or the expression "bound." In the first place, it is to be observed that what is called in the

body of the instrument a "bond," or, by the heading of it, an "obligation," is in the coupon attached to the instrument called a "debenture." Then as regards the authorities. Three cases have been cited in which the Courts have held that the particular instrument which was the subject of construction did constitute a specific charge upon land, and I find, curiously enough, that those three cases just included the three words which are used in this 118th clause of the articles of association. In *In re General South American Company* (1) the instrument was in the form of a bond, but, notwithstanding that, it was held to be a specific charge upon land. In the second case, of *In re Marine Mansions Company* (2), the instrument was headed as a "debenture," and there again it was held to constitute a specific charge. In the third case, *In re Panama, New Zealand, and Australian Royal Mail Company* (3), the instrument was headed as a mortgage debenture. It is true that in all those cases words were used in the instruments to be construed stronger than the words used in this particular instrument. In two of the cases the word "charge" was used, and in the third "charge" and "mortgage," but at the same time those cases to some extent dispose of the argument derived from the mere use of the terms "bond," "debenture," or "mortgage debenture."

That being so, we have to consider what is the meaning of "estate, property, and effects." Now I go to a great extent, if I may say so, with the observations made by the Master of the Rolls upon the subject of words used by conveyancers. There is no doubt that often words are used by them unnecessarily, and consequently no very important signification is to be attached to words which may have been unnecessarily used; but I do not think that that argument can go very far in the present case, for the reason that it is quite unusual to find in mere bonds anything but words importing a personal liability upon the obligor and his heirs, or, as the term is used in the *Lands Clauses Consolidation Act*, 1845, "successors." We come then to this point: we find in the articles of association a company contemplating the issue of bonds which may be a charge upon land. We find a bond which, instead of being a bond in the ordinary form of bonds, does purport to bind

(1) 2 Ch. D. 337. (2) Law Rep. 4 Eq. 601.
(3) Law Rep. 5 Ch. 318.

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"estate, property, and effects." It seems to me when we arrive at that point the mere statement of the position of matters shews this, that we should not be justified in disregarding the words so used; in other words, that we are bound to come to the conclusion that the company did intend to constitute a specific charge, and have constituted a specific charge, upon the property mentioned in the instrument. For these reasons I concur in the judgment proposed by the other members of the Court.

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Dec. 18. The case was mentioned again on the form of the order. The order, as settled, declared that the mortgage debentures were a charge on all the estate, property, and effects of the company comprised in the mortgage debentures; but the declaration was without prejudice to any question as to what estate, property, and effects were comprised in the mortgage debentures, and without prejudice to any question of priority as between the holders of such mortgage debentures and the other mortgages, if any, of the company.

Solicitors for the Appellants: *Lewis, Munns, & Longden.*
Solicitor for the Respondent: *G. M. Clements.*

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## *In re* HOWARD.
## PADLEY *v.* CAMPHAUSEN.

[1876 H. 291.]

*Practice—Service out of Jurisdiction—Foreigner resident abroad—Judicature Act*, 1873, *s.* 76—*Common Law Procedure Act*, 1852, *s.* 19—*Rules of Court*, 1875, *Order* II., *r.* 4; *Order* XI., *rr.* 1, 3, 5—*Appendix A., Forms* 2, 3.

In an action commenced in the Chancery Division the same rule applies as in the Common Law Divisions, that where a Defendant is a foreigner out of the jurisdiction he must be served with notice of the writ, and not with the writ itself.

Statement.

IN this case the Defendants were a man and his wife resident at *Wiesbaden.* The woman was an Englishwoman, and was sued as executrix. The husband was a foreigner.

The writ was served with leave of the Court, and an order was

made that the writ should be served on the wife and notice of the writ on the husband.

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By mistake the person who effected the service at *Wiesbaden* served the writ on the husband instead of the notice. When the action came to a hearing the Defendants did not appear, and the Court gave judgment against them.

On the application to draw up the judgment, the Registrar objected that the service of the writ was irregular, and the whole proceedings invalid.

The matter was then brought before Vice-Chancellor *Hall* on the 6th of December, 1878.

Argument.

*Oswald*, for the Plaintiff, referred to Rules of Court, 1875, Order II., rr. 4, 5; Order XI., rr. 1, 3; Appendix A., Forms 2, 3.

Judgment, V.-C. H.

HALL, V.C., said that the service of the writ on the husband was not sufficient. The question had been decided in *Westman* v. *Aktiebolaget Snickarefabrik* (1), and that case must be followed.

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1878. Dec. 18. On this day the Plaintiff applied *ex parte* to the Court of Appeal to reverse the decision of the Vice-Chancellor.

Argument.

*Oswald*, for the Appellant:—

The rules of the Supreme Court do not contain any express provision that in the case of a foreigner resident out of the jurisdiction notice of the writ, and not the writ itself, should be served on him. The *Common Law Procedure Act*, 1852, s. 19, does contain such a provision, but that only applies to common law actions. In the case of *Westman* v. *Aktiebolaget Snickarefabrik* it was held that the old practice under the *Common Law Procedure Act* remains; but that was an action in a Common Law Division; and moreover the question arose upon an application by the foreigner to set aside the writ and service, whereas in the present case the action is in the Chancery Division, and the Defendants might never apply to set aside the judgment. In Chancery proceedings under the old practice, a copy of the bill was served upon a foreigner out of the jurisdiction. A similar practice ought to prevail now in the Chancery Division.

(1) 1 Ex. D. 237.

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In the course of the argument,

JESSEL, M.R., said—It was not necessary to repeat sect. 19 of the *Common Law Procedure Act* in the *Judicature Act*, because sect. 76 of the *Judicature Act*, 1873, provides that all Acts of Parliament relating to former Courts should be read as applying to Courts constituted under that Act. Therefore the provision of the *Common Law Procedure Act* referred to remains in force, and applies to the Chancery Division equally with the other Divisions.

At the conclusion of the argument,

Judgment, C. A. Jessel, M.R.

JESSEL, M.R., said:—

I am afraid we cannot accede to this application. The point is a very technical one. The Defendant properly abstained from appearing advisedly, and we have no power to interfere, or to order the judgment to go by default against either of the Defendants.

Baggallay and Thesiger, L.JJ.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitor: *Arthur Cayley.*

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1879
*Jan.* 11.

## *In re* MEARES.

*Lunatic—Costs of Inquisition—Deceased Lunatic—Lunacy Regulation Act* (25 & 26 *Vict. c.* 86), *s.* 11.

A person was found to be a lunatic by inquisition, but died before a committee of her estate had been appointed. On an application under the *Lunacy Regulation Act* the Court made a declaration that the costs of the inquisition had been properly incurred, and ought to be paid out of the deceased lunatic's estate in a due course of administration.

Statement.

IN February, 1878, *Eleanor C. L. Meares* was found on inquisition to be a person of unsound mind.

The lunatic died on the 16th of April, 1878, and in consequence of her death the appointment of a committee of her estate was never completed.

The lunatic left a will dated in 1851, by which she gave all her property to her sister *Mary E. Meares*, and appointed *L. H. Fitzgerald* her executor.

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*Mary E. Meares* died before the testatrix, and the property of the lunatic accordingly became divisible among her next of kin.

A petition was now presented by one of the next of kin, praying that the costs, charges, and expenses of and incidental to the petition for inquiry, and of the inquisition, and the costs of all parties to the present application, might be paid out of the lunatic's estate by the executor.

Statement.

*Decimus Sturges*, for the Petitioner, referred to *In re C*—— (1) and the *Lunacy Regulation Act* (25 & 26 Vict. c. 86), s. 11.

Argument.

*Freeling*, for the executor:—

In the case cited the supposed lunatic was alive, and the Court gave no opinion in what way the order for payment of the costs would be enforced. The section of the Act was only intended to apply to cases in which the Court had control over the property of the lunatic or alleged lunatic. In the present case no part of the property of the deceased lunatic is under the control of the Court, and the Court has no jurisdiction to make any order affecting it, or to interfere with the administration of the estate.

JAMES, L.J.:—

Judgment, James, L.J.

In *Williams* v. *Wentworth* (2) the Court held that in the case of money expended for the necessary protection of the person and estate of a lunatic, the law would raise an implied contract, and give a valid demand against the lunatic or his estate. In my opinion, in the present case, the Petitioner is entitled to a declaration that the costs of the proceedings in lunacy were properly incurred, and that such costs, and also the costs of this application, ought to be paid out of the estate of the deceased lunatic in a due course of administration.

BAGGALLAY, L.J., concurred.

Baggallay, L.J.

Solicitors: *Guscotte, Wadham, & Daw*, agents for *O'Donoghue & Anson, Bristol; C. Appleyard.*

(1) Law Rep. 10 Ch. 75.

(2) 5 Beav. 325.

C. A.
1879
Jan. 23.

## *Ex parte* WOOD. *In re* WRIGHT.

*Proof—Proxy—Committee of Lunatic—Secured Creditor—Vote in respect of whole Debt—Abandonment of Security—Dissolution of Partnership—Assignment of retiring Partner's Interest—Conversion of Assets—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16, 40—*Bankruptcy Rules*, 1870, *r.* 272—*Bankruptcy Forms*, 1870, *No.* 32.

12 Ch D. 345
13 Ch D 305

The committee of the estate of a lunatic who is a creditor of a liquidating debtor has no power, without the sanction of the Court of Lunacy, to appoint a proxy to vote on behalf of the lunatic in the liquidation proceedings, or to waive any of his rights against the debtor's estate.

Whether a secured creditor, who in his proof states his security, and afterwards votes at a liquidation meeting in respect of his whole debt, thereby abandons his security, *quære*.

An agreement for the dissolution of a partnership between two traders provided that the balance due to the retiring partner should be paid partly by an immediate cash payment, and partly by weekly instalments, and the continuing partner agreed to enter into a personal bond conditioned for carrying out the terms of the agreement:—

*Held*, that the agreement was an executory one, and that, at any rate till the cash payment had been made and the bond had been given, the assets of the business remained joint assets, and the retiring partner was, subject to the payment of the debts due to the joint creditors, entitled to a lien upon the assets in respect of what remained due to him under the agreement.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, acting as Chief Judge in Bankruptcy.

*William Wright* and *B. J. Sheardown* were partners in trade under the provisions of a deed dated the 1st of December, 1873. The business was carried on under the firm of *Wright & Sheardown*. In July, 1875, *Sheardown* became insane, and in August, 1875, he was placed in a private lunatic asylum. On the 11th of July, 1877, he was found a lunatic by inquisition, and on the 6th of December, 1877, *Charles Roberts* was appointed committee of his estate. After the illness of *Sheardown* commenced, the business was carried on by *Wright* alone under the same firm. On the 13th of November, 1877, an agreement in writing was entered into, subject to the approval of the Lord Chancellor, between *Wright* and *Charles Roberts*, acting on behalf of *Sheardown*. This agreement contained the following provisions:—

"The partnership to be declared dissolved as from the 31st of

December, 1875. The balance due to *B. J. Sheardown* on the 23rd of February, 1877, was ascertained to be the sum of £1355 6*s.* 8*d.*, since which date £21 has been paid, leaving a balance due of £1334 6*s.* 8*d.*, which is proposed to be paid off as follows:—

"(1) To be paid down in cash £334 6*s.* 8*d.*, on account of principal, together with interest on £1334 6*s.* 8*d.* from the 17th of March, 1877, to the date of this agreement at 5 per cent. per annum.

"(2) On account of the balance of principal of £1000 there shall be paid weekly the sum of £10 from the date of this agreement, along with £2 2*s.* per week maintenance money, together with interest at the rate of 5 per cent. per annum on the amount of principal so due at each week, until the balance of principal is reduced to £500.

"(3) On account of such balance of £500 thenceforward the weekly payment of £10 shall be continued, along with £1 1*s.* per week for maintenance money, together with interest at the same rate as aforesaid until the whole is paid off.

"I, *William Wright*, also agree to enter into a personal bond conditioned for carrying out these terms, and to pay Mr. *Sheardown's* costs in connection with the dissolution, not to exceed £52 10*s.*"

This agreement was approved by the Court of Lunacy on the 6th of December, 1877. Nothing, however, was done by *Wright* to carry out the terms of the agreement. He did not make any of the payments due under it; he did not execute any bond in pursuance of it, and he did not advertise the dissolution of the partnership. On the 18th of April, 1878, *Roberts*, as committee of *Sheardown*, commenced an action against *Wright* for the £334 6*s.* 8*d.* and interest, and, on the 30th of April, he signed judgment for £378 7*s.* 6*d.* and costs, but no payment was made by *Wright*. *Wright* continued to carry on the business alone under the old firm until, on the 23rd of May, 1878, he filed a liquidation petition. On the 6th of June, 1878, *Roberts* made an affidavit of proof in the liquidation proceedings, in which he described himself as the committee of *Sheardown*, and deposed that *Wright* was indebted to him as such committee in the sum of £1338 0*s.* 8*d.*, part thereof, viz., £1334 6*s.* 8*d.*, being the balance remaining due to him as such committee by virtue of the agree-

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ment of the 13th of November, 1877, and £3 14*s.*, the remainder of the £1338 0*s.* 8*d.*, being the costs of the judgment of the 30th of April, 1878. And he said that neither he nor the lunatic had any security for the sum so due, except the said agreement and the said judgment. At the foot of the affidavit was a note signed by *Roberts* appointing three persons named, "and each and every of them, my proxy in the above matter." This proof was exhibited by one of the proxies at the first meeting of the creditors on the 7th of June, 1878, when a resolution was passed in favour of a liquidation by arrangement, the proxy voting for the resolution. A memorandum was indorsed on the proof stating that *Roberts*, as representing the estate of *Sheardown*, claimed to be entitled to payment of the £1334 6*s.* 8*d.* in full out of the assets, and also that he claimed to prove for £130 4*s.*, being the amount of maintenance money at the rate of £2 2*s.* per week under the agreement from the 17th of March, 1877, to the 23rd of May, 1878, and also for £78 19*s.* 4*d.*, being interest on the £1334 6*s.* 8*d.* from the 17th of March, 1877, to the 23rd of May, 1878, which he also claimed to be paid in full. *Roberts* had not obtained the sanction of the Court of Lunacy for the making of this proof or the appointment of a proxy. On the 6th of August, 1878, upon the application of *Roberts* as committee, the Registrar made an order declaring that *Sheardown* or his estate was entitled to a lien upon the assets, property, credits, and effects of the business lately carried on by him and *Wright* in partnership, subject to any claims by the joint creditors of the partnership which were in existence on the 31st of December, 1875, the date of the dissolution of the partnership, for the interest due to *Sheardown* or his estate under the agreement of the 13th of November, 1877, and under the judgment of the 30th of April, 1878, and ordering that consequential accounts and inquiries should be taken and made. The trustee appealed.

Argument.

*De Gex*, Q.C., and *S. Woolf*, for the Appellant:—

The effect of the agreement of the 13th of November was to convert the joint assets into separate assets of *Wright*, the continuing partner. A mere verbal agreement is sufficient for that purpose: *Ex parte Ruffin* (1); *Ex parte Williams* (2); *In re*

(1) 6 Ves. 119. (2) 11 Ves. 3.

*Simpson* (1); *Ex parte Clarkson* (2); *Lindley* on Partnership (3). The agreement was executed, not executory. Moreover, the assets were in the reputed ownership of *Wright*.

[JAMES, L.J.:—I do not see how the question of reputed ownership can arise.]

At any rate, if a lien originally existed, it has been lost by the vote of the proxy in respect of the whole debt. A secured creditor who votes in respect of his whole debt thereby abandons his security: *Bankruptcy Act*, 1867, ss. 16, 40; *Ex parte Solomon* (4); *Ex parte Ashworth* (5).

*Winslow*, Q.C., and *Popham*, for the committee of the lunatic:—

The committee of a lunatic has no power to appoint a proxy on behalf of the lunatic, or to abandon any of his rights, without the sanction of the Court.

[They were stopped by the Court.]

JAMES, L.J.:—

Judgment, James, L.J.

In my opinion the decision of the Registrar was quite right. To my mind the agreement of the 13th of November is an executory agreement, to be executed by the payment of the money down, the execution of the bond, and the giving notice of the dissolution of the partnership, all of which things it was necessary should be done by the continuing partner. The true intent and meaning of the parties was that there should be no transfer of the right to possession of the assets till all those three things had been done, certainly not until the money had been paid and the bond given. Till then the whole thing remained completely *in fieri*, and the case is quite distinguishable from those which have been relied upon. To make it resemble them the money should have been paid, and the bond given. Nothing, however, was done of that which it was intended should be done before any right of dealing with the assets as his own was to be conferred upon *Wright*. As to the alleged waiver of the security, that is a question which will require further consideration when it really

(1) Law Rep. 9 Ch. 572.
(2) 4 Dea. & Ch. 56.
(3) 4th Ed. pp. 1168–1170.
(4) 1 Gly. & J. 25.
(5) Law Rep. 18 Eq. 705.

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arises. But here the lunatic was the creditor, and the committee had no power, without the sanction of the Court of Lunacy, to give the proxy or to waive any of the lunatic's rights. The proxy was a mere piece of waste paper so far as the lunatic or his estate was concerned. I am of opinion that the order of the Registrar must be affirmed.

Judgment, Baggallay, L.J.

BAGGALLAY, L.J.:—

I am of the same opinion, and for the same reasons.

Bramwell, L.J.

BRAMWELL, L.J.:—And I.

Solicitors for Trustee: *Lewis, Munns, & Longden.*
Solicitors for Committee: *Wilkinson & Son.*

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C. A. 1878 V.-C. M. *Dec.* 19. C. A. 1879 *Jan.* 29.

## RUSTON *v.* TOBIN.

[1877 R. 15.]

*Trial by Jury—Action to set aside Agreement for Fraud—Rules of Court*, 1875, *Order* XXXVI., *rr.* 3, 26.

The Plaintiffs brought an action in the Chancery Division to set aside an agreement on the ground that they had been induced to enter into it by the fraudulent representations of the Defendant. The pleadings having been closed the Plaintiffs gave notice of trial by jury. The Defendants thereupon moved that the action might be tried by the Judge without a jury:—

*Held*, by *Malins*, V.C., that the case ought to be tried before the Judge without a jury.

*Held*, on appeal, that the discretion of a Judge as to the mode in which an action attached to his branch of the Court can be most conveniently tried will not be interfered with except in a very strong case, and that the order of the Vice-Chancellor must be affirmed.

*Per Jessel*, M.R.: Having regard to the nature of the action the discretion of the Vice-Chancellor had been rightly exercised.

Statement.

ON the 15th of April, 1876, an agreement in writing was entered into between the Plaintiffs and the Defendant, by which the Defendant agreed, in consideration of a sum of £6000 to be paid to him by the Plaintiffs, and the royalties or share of profits to be paid to him as therein mentioned, to assign to the Plaintiffs certain letters patent for the invention of an improved mode of venti-

lating rooms, which was also patented in *France* and *Belgium*. £3000 was to be paid on the signing of the agreement, and £3000 on the 15th of May then next, when assignments were to be executed to the Plaintiffs containing covenants by the Plaintiffs to pay to the Defendant three-eighths of the net profits to be derived from the patents. The first £3000 was paid, but it was shortly afterwards discovered that the Belgian patent had lapsed, and it was referred to arbitration to ascertain how much the purchase-money ought to be reduced in consequence. In September, 1876, the Plaintiffs commenced business operations for working the patents.

In January, 1877, the Plaintiffs commenced this action, alleging that the English patent was void by reason of prior patents by which the invention was anticipated, and that the Defendant was well aware thereof, but concealed the fact from the Plaintiffs. They also alleged that the Defendant had made to the Plaintiffs various false representations for the purpose of inducing them to enter into the agreement, and that the Plaintiffs had signed it on the faith of the truth of such representations. The Plaintiffs claimed to have it declared that the agreement was obtained by the fraudulent misrepresentations of the Defendant, and to have the agreement delivered up to be cancelled, to have the £3000 repaid with interest, and to have damages for the loss sustained by the Plaintiffs through entering into the agreement.

The Defendant put in a defence and counter-claim. He denied all misrepresentation, insisted on the validity of the patent and of the agreement, and claimed to have the agreement specifically performed. The Plaintiffs, on the 12th of January, 1878, delivered a reply. The Defendant delivered a rejoinder, after which the Plaintiffs delivered an amended reply, and the Defendant on the 18th of June, 1878, delivered an amended rejoinder, which closed the pleadings. The Plaintiffs on the 12th of December, 1878, gave notice of trial by a Judge and jury in *Middlesex* for the 23rd of December, and on the same day gave a notice stating that it was their intention to have the action tried by a special jury.

The Defendant, on the 19th of December, 1878, moved before Vice-Chancellor *Malins*, to whose Court the action was attached, that it might be tried by his Lordship without a jury, or that

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such other directions might be given with regard to the trial as the Court might think proper.

*Higgins*, Q.C., and *G. Sangster Green*, for the motion :—

The power given by Rules of Court, 1875, Order XXXVI., rule 3, is controlled by rule 26. The Plaintiffs cannot be allowed to bring the Defendant to this Court and obtain his statement of defence, and then practically go to the Common Law Division: *Back* v. *Hay* (1); *Pilley* v. *Baylis* (2). The only result will be that many useless issues will be tried, and then the case will come back here to be disposed of. In a simple case, where a final judgment can be given on the trial, as *Bordier* v. *Burrell* (3) and *Garling* v. *Royds* (4), it is different.

*Glasse*, Q.C., and *Dundas Gardiner*, for the Plaintiffs :—

A Plaintiff has an absolute right under Order XXXVI., rule 3, to have the questions tried by a jury. These Plaintiffs were obliged under sect. 34 of the *Judicature Act* to come here in order to get the relief they ask as to the cancellation of the agreement. But though the relief is within the jurisdiction of Equity the questions of fact ought to be decided by a jury: *Clarke* v. *Cookson* (5); *Sugg* v. *Silber* (6). There is only one issue, viz., fraud, and the Court ought not to interfere with our statutory right to have a trial before a Judge and jury. No doubt the Plaintiffs demand a payment of money, but that is not the only relief, and they were compelled to come here. In *Brooke* v. *Wigg* (7), rule 26 of Order XXXVI. was not relied upon. Order XXXVI., rule 3, is absolute unless the case comes within the exception of rule 26.

Judgment, V.-C. M.

MALINS, V.C. :—

This is an action commenced in January, 1877; therefore, from the stage at which the matter is at present, the Plaintiffs must have been very slow in their proceedings. It appears that the Plaintiffs, who are said to be a syndicate established for the

(1) 5 Ch. D. 235.
(2) Ibid. 241.
(3) Ibid. 512.
(4) 25 W. R. 123.
(5) 2 Ch. D. 746.
(6) 1 Q. B. D. 362.
(7) 8 Ch. D. 510.

purpose of making an agreement with the Defendant *Martin Tobin* to purchase from him, in consideration of £3000 to be paid, which sum I understand has been paid, and £3000 more to be paid, which sum I understand has not been paid, certain patents. That agreement is in writing, and is dated the 15th of April, 1876. The Plaintiffs allege that they have by the Defendant been defrauded out of their money, and that they have therefore a right to recover it back; and they claim to have the agreement cancelled, to have the money repaid, to have damages for the loss sustained by them through misrepresentation, and to have such further relief as to the Court may seem fit. Now, of these four heads of relief, three, at all events, might have been the subject of an action at law, namely, the repayment of the £3000, damages for the loss sustained, and such other relief as the Court may think fit to give; the only justification for coming into this Court being that, as the agreement was obtained by fraud, they wanted it delivered up to be cancelled. I take it to be clear that when a man obtains money from another by fraud and misrepresentation, if he can prove that fact he can recover the money back in an action at law, and when he has made an agreement in writing under which the money was paid, or under which other money has to be paid, there is no occasion whatever for his coming into this Court to have the instrument delivered up to be cancelled. Such cases occur every day in the Courts of Law and Equity, and in this case the Plaintiffs might have maintained an action at law against *Tobin*, and there was no occasion whatever for their coming into this Court, unless it was that they preferred this as the tribunal to decide between them.

The great topic Mr. *Glasse* has urged is that under the rules of the *Judicature Act* they were obliged to come into this Court because jurisdiction is assigned to this Court in all cases for the rectification or cancellation of written instruments. And if the cancellation or rectification of a written instrument had been absolutely essential to the relief they sought, then I should think there was a justification for coming here; but as I am clearly of opinion that no rectification or cancellation was necessary in this case, they were not obliged to come here, but might have gone to any one of the Common Law Divisions.

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Now these observations are only important on this point, that, there being two branches of the Court to which they might resort, they have selected the Chancery Division, and having so selected their own tribunal, very strong reason must be shewn why the jurisdiction should be shifted, and why he who has been brought into a Court of Equity to answer charges against him, and who has answered them in a statement of defence and a counter-claim, should now be taken before a jury.

But, independently of these considerations, this is a case of setting aside a transaction on the ground that it was brought about by fraud. Now, as I pointed out in many cases, particularly in the case of *Back* v. *Hay* (1), that is peculiarly, and always has been considered peculiarly the jurisdiction of the Court of Chancery when that Court existed, and is the jurisdiction and business of this Court now that it is simply called the Chancery Division. There are no cases of that nature, however complicated, however difficult, however lengthy, which this Court has not been in the habit of dealing with, and which it does not deal with almost constantly. It is therefore, and always has been, considered the peculiar tribunal for trying these questions, and being so, I could not send such a case to be tried by a jury unless I was absolutely satisfied that justice could not be obtained here, or that there is an absolute right on the part of the Plaintiffs to take the Defendant to a jury.

Now that entirely depends on the rules which have been referred to in Order XXXVI. [His Lordship read rule 3.] But, it being foreseen that a notice for trial before a jury might be given in many cases which could more properly be tried in this branch of the Court, the 26th rule of Order XXXVI. gives the Court a discretion. "The Court or a Judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury." Now this case clearly falls within that rule, because, before the passing of this Act, it was, as I have already mentioned, the ordinary jurisdiction of this Court to try such cases without the consent of either party,

(1) 5 Ch. D. 235.

and therefore there is a discretion given to the Court by the 26th rule of Order XXXVI.

Having, then, a discretion, the question arises how ought I to exercise it? Many cases have been cited and pressed upon me in which the Court has allowed the parties to go to a jury. Many cases may occur, many cases have already occured before me, in which, if either of the parties had desired a jury, I should very willingly have acceded to their suggestion. Such are cases of nuisance from the darkening of ancient lights; such are cases of nuisance by offensive smells, or by noises, or anything of that kind; and, accordingly, in the cases of *West* v. *White* (1), in which the question was whether the Plaintiffs sustained a nuisance by the erection of certain cement works in their neighbourhood, although it commenced here by a bill in the old times for an injunction to restrain the nuisance, the parties desiring a jury, and as the simple fact to be decided was nuisance or no nuisance, the Vice-Chancellor, in my opinion, most properly exercised his discretion by letting the parties go to a jury to try that single question. The case of *Bordier* v. *Burrell* (2), before the Master of the Rolls, was much pressed upon me, but I do not find in it a single syllable falling from the Master of the Rolls which indicates to my mind that he would have dissented from my decisions in *Pilley* v. *Baylis* (3) and *Back* v. *Hay* (4), if they had been cited to him; and I should have myself done in that case the very thing he did. It was a case of alleged nuisance by the darkening of an ancient window, and that being the one matter of fact to be decided in the case, he said it was a case for him to exercise the discretion given by the 26th rule in allowing the case to be tried by a jury.

The same observation will apply to all the other cases, such as *Clarke* v. *Cookson* (5), before Vice-Chancellor *Hall*. They all proceed on the same principle, that where there is a single question to be decided which may be conveniently and better decided by a jury than by a Court without a jury, in that case the Court will exercise its discretion by allowing the matter to go before a jury. But in this case I have two very strong reasons, to my mind, why

(1) 4 Ch. D. 631.
(2) 5 Ch. D. 512.
(3) 5 Ch. D. 241.
(4) Ibid. 235.
(5) 2 Ch. D. 746.

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I ought not to allow this to go before a jury. The first is that the Plaintiff, not being obliged to come to this Court, but being at perfect liberty to go to any Common Law Division, has selected this Division; and after he has dragged his opponent here, and put him to considerable expense, I think he has no right whatever to change the jurisdiction. Having selected it, here he must stay, unless he can shew some overwhelming reason for the contrary course. Another reason is that there is no occasion whatever that this should go to a jury. It is a mere common case of allegation of fraud on the one side denied on the other—just such a case as this Court is in the habit of trying constantly. Therefore, without adverting more particularly to the case, I entirely adhere to what I said in *Back* v. *Hay* (1), and what I also said in *Pilley* v. *Baylis* (2), and what I also said in another case of *Sykes* v. *Firth*, which was before me on the 8th of February, 1877; and I do not find that in any Court there has been a single syllable of dissent from those decisions. I gave my reasons in full length there, and I entirely adhere to them, therefore I accede to this motion. I may add that although in *Brooke* v. *Wigg* (3) the circumstances were different, the principles of that case are entirely applicable to the present. There the parties had deprived themselves of a trial by jury by agreeing to take evidence by affidavit. Here, in my opinion, the Plaintiffs have precluded themselves from trial by jury by selecting this as the tribunal.

C. A. The Plaintiffs appealed. The appeal was heard on the 29th of January, 1879.

Argument. *Glasse*, Q.C., and *Dundas Gardiner*, for the appeal:—

We submit that Order XXXVI., rule 3, gives a positive right to a trial by jury, and that the case is not within the exceptions in rule 26. The effect of the latter rule was considered in *Bordier* v. *Burrell* (4). The Plaintiffs are not to be deprived of their right to have their case tried by a jury unless it is one not proper for that mode of trial, and an issue of fraud is one for which a trial

(1) 5 Ch. D. 235.
(2) Ibid. 241.
(3) 8 Ch. D. 510.
(4) 5 Ch. D. 512.

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by jury is particularly suitable. The Vice-Chancellor did not exercise a discretion, but went on the ground that the Plaintiffs by coming into the Chancery Division had elected their mode of trial, which we submit is a clearly erroneous view.

Argument.

*Higgins*, Q.C., and *G. Sangster Green*, *contrà*, were not called upon.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

I am of opinion that, as was said in *Swindell* v. *Birmingham Syndicate* (1), the Court of Appeal ought not as a general rule to interfere with the discretion of a Judge as to the way in which a case before him shall be tried. There may be a case so strong as to induce it to interfere, but it must be a very strong case. It is said that the Judge ought not to have decided such a point on reading the pleadings, but in my opinion that was just what he ought to have done. Then it is urged that the Vice-Chancellor exercised no discretion, but it clearly appears to me that he did. He went on the ground that this was a kind of case which had always been tried in Chancery, and never at Common Law; not a case turning on a single misstatement, but on a series of representations, so that there was no single question of fact which could be conveniently submitted to a jury. It is no part of my duty to say what I should have done if this case had come before me in the first instance, but I do unhesitatingly say that I should have done what the Vice-Chancellor has done.

James, L.J.

JAMES, L.J.:—

I am of the same opinion, and I repeat what I have often said before, that these appeals from the discretion of a Judge as to the mode in which a case before him can most conveniently be tried ought not to be brought. When a Judge has a discretion as to the mode of trial, his exercise of that discretion is not to be interfered with. If he were to say that he exercised it in a particular way, because he held a certain opinion on a matter of law, and the Court of Appeal considered that he was wrong in his opinion

(1) 3 Ch. D. 127.

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on that matter of law, it would interfere; but I think that there is hardly any other case in which it would do so.

BRAMWELL, L.J., concurred.

Solicitors for Plaintiffs: *Swann & Co.*
Solicitor for Defendant: *Walter Webb.*

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C. A. 1879 Jan. 30.

## *Ex parte* BRIGHT. *In re* SMITH.

*Reputed Ownership—Order and Disposition—Agency—Notice—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.

Goods were consigned by manufacturers under an agreement which, in the opinion of the Court, made the consignees, not purchasers of the goods, but agents of the manufacturers for their sale. The agents described themselves, upon a brass plate which was affixed at their place of business, and also upon the invoices which they used, as "merchants and manufacturers' agents." They acted as agents in the same way for several other manufacturers:—

*Held*, that the creditors of the agents had notice of the agency sufficient to exclude the operation of the reputed ownership clause, and the trustee in their liquidation was ordered to deliver up to the manufacturers goods of theirs which were in the possession of the agents, in specie, at the commencement of their liquidation, and to pay over to the manufacturers the proceeds of the sale of their goods which had been sold.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

*R. Gemmell Smith* and *Samuel Kidd* carried on business in partnership, under the firm of *Gemmell Smith & Co.*, at No. 106, *Cheapside*, in the City of *London*, describing themselves as merchants and manufacturers' agents. In the course of December, 1877, some correspondence took place between them and Messrs. *John Bright & Brothers*, manufacturers, of *Manchester*, respecting a supply of their goods to *Smith & Co.* Some personal interviews took place, and ultimately, on the 30th of January, 1878, *Smith & Co.* wrote a letter to *John Bright & Brothers* as follows:—

"We are in receipt of your favour dated the 29th instant, and

now beg to state the terms as agreed between us on which we propose to use your manufactures.

"1st. It is agreed that, when quoting prices to us, you are to make them as low as possible, leaving yourselves only the ordinary manufacturing profit which you are in the habit of getting.

"2nd. It is agreed that we shall offer and sell your goods throughout *Great Britain* and *Ireland*, at such an advance on your prices as we may deem right, so as to leave us a fair commission covering travelling expenses, &c.

"3rd. It is agreed that we shall be entitled to retain this advance obtained on your cost, but that all other moneys or bills which shall be received by us as payment for your goods shall be duly collected and remitted by us.

"4th. We agree to guarantee all accounts.

"5th. It is agreed we shall at any time give you the names of our customers to whom we are supplying your goods, it being distinctly understood that at no time you will sell to any one doing a drapery or retail business, or otherwise make use of such information for the purpose of selling goods.

"We think the foregoing terms will be found in order, and await your confirmation."

On the 23rd of February, 1878, *John Bright & Brothers* replied as follows:—

"Referring to your favour of the 30th of January, as to the terms on which you propose to undertake the sale of our goods on our behalf, we beg to say these terms appear to us to be satisfactory and in accordance with the arrangement verbally made. As we have not yet received the written agreement empowering us to collect ourselves all moneys due to you on account of our goods, at any time we wish to do so, we shall be obliged by your kind attention to the same. We shall rely on your best efforts to secure the promptest possible payment of all accounts. We are sending a formal invoice with each delivery of goods, for convenience in keeping the accounts. We trust our arrangements will prove mutually advantageous and satisfactory."

On the 25th of February, 1878, *Smith & Co.* replied as follows:—

"In compliance with yours of the 23rd, we hereby agree to give

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you power at any time you may require it, to collect all moneys due on account of your goods supplied by us, with the understanding, however, that we shall be entitled to receive that margin of profit or commission which may have been obtained by us over and above cost price. As regards the collection of accounts it is quite as much our interest as yours to have this done as promptly as possible, and you can rely on no neglect in this respect. With your careful attention to our requirements, we have no doubt the business will be found mutually advantageous."

This was the close of the correspondence.

*John Bright & Brothers* then consigned goods of their manufacture to *Smith & Co.*, and continued to do so, until in August, 1878, *Smith & Co.* filed a liquidation petition. *Smith & Co.* described themselves as "merchants and manufacturers' agents," upon a brass plate affixed at their place of business and also upon the invoices which they sent to their customers. They sold the goods of several other manufacturers with whom they had made arrangements similar to that which they had made with *John Bright & Brothers.* After the appointment of a trustee in the liquidation, *John Bright & Brothers* applied to the Court for an order that the trustee should deliver up to them all the goods consigned by them to the debtors which were in specie in his possession as trustee, and should pay over to them all moneys received by him in payment for goods belonging to *John Bright & Brothers,* and that all moneys remaining due to the debtors from their customers for goods of *John Bright & Brothers* should be paid to them.

There was evidence as to the mode of dealing between *John Bright & Brothers* and the debtors after the above arrangement had been entered into, but the view taken by the Court of Appeal renders it unnecessary to state the effect of it.

The Registrar was of opinion, on the construction of the agreement, that the debtors were agents for the sale of the goods of *John Bright & Brothers,* not purchasers of the goods from them. But he held that the fact of the agency was not sufficently notorious, by reason either of what was done in the particular case or of any general custom of the trade, to exclude the operation of the reputed ownership clause, and that consequently

the goods passed to the trustee as being at the commencement of the liquidation in the order and disposition of the debtors as reputed owners with the consent of *John Bright & Brothers*.

His Honour accordingly refused the application.

*John Bright & Brothers* appealed.

Argument

*De Gex*, Q.C., and *Finlay Knight*, for the Appellants:—

The reputed ownership clause does not apply to factors: *Scott* v. *Surman* (1). A factor is really a trustee, and goods of his principal in his possession are entitled to the same privileges as trust property: *Robson's* Bankruptcy (2). And by sect. 15 of the *Bankruptcy Act*, 1869, property held by the bankrupt on trust is not divisible amongst his creditors.

[JESSEL, M.R.:—If with the consent of the true owner a factor held himself out as principal, would not the doctrine of reputed ownership apply?]

At any rate, in the present case the debtors gave sufficient notice to all their creditors that they were agents, and no creditor was justified in concluding that any goods in their possession were their own: *Ex parte Watkins* (3). On the construction of the agreement between them and the Appellants they clearly were only agents. *Ex parte White* (4) is distinguishable. The debtors agreed to guarantee the accounts of their customers; they were *del credere* agents. That of itself is enough to shew that they were not purchasers of the goods.

*Winslow*, Q.C., and *Arnold Morley*, for the trustee:—

*Ex parte White* applies, and shews that the debtors bought the goods as principals. *Livesay* v. *Hood* (5) shews that goods sent on sale or return pass under the reputed ownership clause. *Gibson* v. *Bray* (6) is distinguishable. Here the goods were purchased by the debtors. The use of the word "agents" is not enough to exclude reputation of ownership; that word is very often used

(1) Willes, 400.
(2) 3rd Ed. p. 465.
(3) Law Rep. 8 Ch. 520.
(4) Law Rep. 6 Ch. 397; S. C. in H. L., 21 W. R. 465.
(5) 2 Camp. 83.
(6) 8 Taunt. 76.

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when the so-called agent is really a purchaser. It only means that he sells the goods of a particular manufacturer.

JESSEL, M.R.:—

The first question we have to decide is, what was the true relation subsisting between the debtors and the claimants of the goods, and if, as I think, the right decision will be that the goods remained the goods of the claimants, then there is the further question, whether they were in the order and disposition of the debtors. Now, in order to ascertain what the true relation between the parties was, we have furnished to us in this case the actual written agreement between them. [His Lordship read the correspondence above stated, and continued:—]

It appears to me that that creates, not the relation of vendor and purchaser, but that of principal and agent. There is nothing to prevent the principal from remunerating the agent by a commission varying according to the amount of the profit obtained by the sale. *A fortiori* there is nothing to prevent his paying a commission depending upon the surplus which the agent can obtain over and above the price which will satisfy the principal. The amount of commission does not turn the agent into a purchaser. The principal says, "You must sell my goods; whatever you get for them over and above the price I am willing to accept shall be yours as commission." If a gentleman sent his groom with a horse to a fair to sell it for £80, and said to him, "Whatever you get over £80 you shall have for yourself," would that make the groom the purchaser of the horse? If the groom did sell the horse for more than £80, would it make him any the less accountable for the proceeds? It seems to me impossible to say that with such a mode of remuneration the character of the agent can change. But in addition to that we have a great number of other circumstances which shew that it was intended to be an agency. In the first place, it is to be noticed that the debtors guarantee all accounts, that is, the agents are to be liable for the purchasers of the goods paying the money, so that the commission is what is called a *del credere* commission. That is wholly inconsistent with the notion that the debtors were the real purchasers, for then they would be guaranteeing themselves; they would be personally liable to

pay as purchasers, and what would be the use of guaranteeing payment by themselves? This shews what the real relation between them was. I am satisfied that it would not be a question for the jury, but that the Judge before whom such a case was being tried ought to instruct the jury that the relation was that of principal and agent, and not that of vendor and purchaser.

As regards the evidence as to the course of dealing, I cannot see how that affects the construction of the written documents. If it could have any effect it must amount to shewing a new agreement, which it does not, and, that being so, there is no further question as to the true relation between the parties.

The next point is whether the goods were in the order and disposition of the debtors, that is, whether they were allowed to deal with them as reputed owners with the consent of the real owners. Now, in the first place, the debtors never held themselves out as the owners of the goods at all. They told all the world that they carried on business as "merchants and manufacturers' agents"; these words were on their invoices and on their door, and there is no evidence that they ever described themselves otherwise. The result was that every one dealing with them knew that they had a business as agents, and this was no holding out without a foundation, for it is admitted that they really were agents, not only for the present Appellants, but for other persons. It was their real business; they called themselves, not that which they were not, but that which they were. That being so, if a man says to his creditors "I carry on business as a merchant and factor," can the creditors say "I give you credit on the faith that any goods in your warehouse belong to you, not as factor, but as merchant?" The creditor knows that, by reason of the business carried on, the goods may not belong to the debtor, and it cannot be said that credit is given on the faith that the goods were his own. The description "merchants and manufacturers' agents" was sufficient to let anybody know that the debtors had goods as agents, that the whole of the goods on their premises might in fact be there in that capacity. It does not appear to me to be necessary to carry the case further, for there was no acting as reputed owners. On these grounds, it appears to me that the decision of the Registrar cannot be sustained.

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JAMES, L.J.:—

I entirely agree. *Ex parte White* (1) and the other cases which have been cited to us were decisions upon facts, and such cases when quoted and argued upon only tend to waste the time of the Court and divert its attention from the principle upon which the case should be decided. No principle with which we are not perfectly familiar is established by any of those cases. In *Ex parte White* it was decided that the use of the word "agent" was not decisive; in the other cases the facts were looked to to shew that delusive credit had been obtained. In the present case, as between the Appellants and the debtors, there was an agency, for it is to be taken as an inference from the facts that what they announced themselves to the world they in reality were. Everybody dealt with them as merchants and manufacturers' agents, and therefore distinct notice was given that goods were in their possession as agents.

Bramwell, L.J.

BRAMWELL, L.J.:—

I am of the same opinion.

Solicitor for Appellants: *F. W. Reynolds*, agent for *Potter & Lowe, Manchester.*

Solicitors for Trustee: *Phelps, Sidgwick, & Biddle.*

(1) Law Rep. 6 Ch. 397; S. C. in H. L., 21 W. R. 465.

## *Ex parte* SHEPHERD. *In re* SHEPHERD.

C. A. 1879 Jan. 30.

*Debtor's Summons — Application to dismiss—Security — Married Woman— Separate Trading—Liability of Husband—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 7.

A married woman carried on in her maiden name a millinery business separately from her husband. A debtor's summons was issued against the husband and wife, claiming the payment of a sum due upon some bills of exchange drawn by the summoning creditor upon and accepted by the wife in her maiden name, and dishonoured. The husband applied to the Court to dismiss the summons. He deposed that he never authorized his wife to pledge his credit, and that five years previously he had given notice to the summoning creditor that he had nothing to do with his wife's business. On this evidence, which was uncontradicted, the Registrar made the common order staying the proceedings on security being given by the husband:—

*Held*, that on the evidence the husband was not liable for the debt; that the issuing of the summons was an abuse of the procedure; and that the summons must be dismissed with costs.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, acting as Chief Judge in Bankruptcy.

*Arthur Shepherd* carried on the business of a wine merchant at 20, *Clifford Street, Bond Street.* In 1864 he married Miss *Fanny Comer.* She carried on, after the marriage, the business of a milliner and dressmaker in her maiden name. Her place of business was at No. 10, *Belgrave Mansions, Pimlico.* She and her husband lived at No. 29, *Belgrave Mansions*, which was in the same building as No. 10, No. 10 being on the ground floor, and No. 29 on an upper floor. In June, 1878, Mrs. *Shepherd* absconded. On the 25th of July a debtor's summons was issued by *Eugène Louvet*, a silk mercer in *Paris* and in *London*, against Mr. and Mrs. *Shepherd*, describing them as "both lately carrying on the business of a milliner and dressmaker, under the name of *Fanny Comer*, at No. 10, *Belgrave Mansions.*" The summons claimed payment of £382 17*s.* for the amount due upon four bills of exchange drawn by *Louvet* upon and accepted by *Fanny Comer*, and dishonoured, "the consideration therefor being goods sold and delivered by the said *Eugène Louvet* to and for the use of you the said *Arthur Shepherd* and *Fanny Shepherd* or one

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of you." *Shepherd* applied to the Court to dismiss the summons. On the hearing of the application he was examined, and stated that he never had any connection with his wife's business, and never authorized her to pledge his credit; that No. 29, *Belgrave Mansions*, was taken in his name; and that sometime in 1873 he gave notice to the agent of *Louvet* that he had nothing to do with the business. This evidence was not contradicted.

The Registrar made an order staying the proceedings on the summons, upon *Shepherd* giving security for double the sum claimed.

*Shepherd* appealed.

Argument.

*Pollard*, for the Appellant:—

The husband is not liable, and the summons ought to have been dismissed.

[He was stopped by the Court.]

*E. C. Willis*, for the creditor:—

The husband is liable, for he allowed his wife to obtain goods by trading under a fancy name. In accepting the bills she must be taken to have acted as his agent.

[JESSEL, M.R.:—You must shew that he authorized her to do so.]

He has not said that he had no interest in the business; it must be taken to have been his business, carried on in his wife's maiden name. As the Registrar was in our favour we adduced no evidence; we ought to have an opportunity of adducing evidence now.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

In my opinion this is a mere abuse of the procedure of the Act; it was never intended that a debtor's summons should be issued in such a case as this. Upon the facts in evidence, the husband is not liable at all. If the creditor has any evidence to adduce, he can bring an action against the husband. The Registrar should have dismissed the summons with costs, and that

order must now be made, and the Appellant must have his costs of the appeal.

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Judgment, James, L.J.

JAMES, L.J.:—

I quite agree. A debtor's summons ought not to be made use of for purposes of oppression and vexation.

Bramwell, L.J.

BRAMWELL, L.J.:—

I am entirely of the same opinion. This is a procedure of a very severe kind. It ought not to be resorted to in such a case as the present.

Solicitors for Appellant: *Tidy & Tidy.*
Solicitor for Creditor: *T. A. G. Powell.*

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## *Ex parte* SHERIFF OF MIDDLESEX. *In re* BUCK.

C. A. 1879 *Jan.* 30.

*London Court of Bankruptcy—Jurisdiction—Interpleader Order—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 65.

Where goods seized by a sheriff under a writ of *fi. fa.* issued by the *London* Court of Bankruptcy are claimed adversely, that Court has jurisdiction, on the application of the sheriff, to make an interpleader order.

Sect. 65 confers on the *London* Court of Bankruptcy, for the purposes of the *Bankruptcy Act*, all the jurisdiction formerly possessed by the Superior Courts of Common Law.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, acting as Chief Judge in Bankruptcy.

On the 26th of July, 1878, a bankruptcy petition, which had been presented in the *London* Court of Bankruptcy by *A. D. Smith* against *Buck*, was dismissed by Mr. Registrar *Hazlitt*, *Buck's* creditors having resolved to accept a composition, but it was ordered that *Buck* should pay the costs of the petitioning creditor. On the 5th of August these costs were taxed at £43 5*s.* 4*d.*, and on the 15th of August a writ of *fi. fa.* for that sum was issued against *Buck*. Under this writ the sheriff of *Middlesex* seized goods in *Buck's* house. The goods were claimed by one *George*

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*Kirby* under a bill of sale executed by *Buck* in January, 1876, and duly registered. The sheriff then applied to the *London* Bankruptcy Court for an order that *Smith* and *Kirby* should attend at that Court and state the nature and particulars of their respective claims to the goods seized, and maintain or relinquish their claims thereto, and abide by such order as the Court might make, and that in the meantime all further proceedings should be stayed. The Registrar refused the application, on the ground that the Court of Bankruptcy had no jurisdiction to make an interpleader order. The sheriff appealed.

Argument.

*T. L. Wilkinson*, for the Appellant:—

The writ of *fi. fa.* was issued under the powers given to the *London* Court by rules 186, 229, 230, of the Bankruptcy Rules, 1870. The writ is tested in the name of the Chief Judge. The jurisdiction in interpleader was given to the Courts of Common Law by statute, and sect. 65 of the *Bankruptcy Act*, 1869, provides that "the *London* Court of Bankruptcy shall continue to be a Court of law and of equity, and a principal Court of record, and the Chief Judge in Bankruptcy shall have all the powers, jurisdiction, and privileges possessed by any Judge of Her Majesty's Superior Courts of Common Law at *Westminster*, or by any Judge of Her Majesty's High Court of Chancery." This confers the jurisdiction in interpleader on the *London* Bankruptcy Court for the purposes of the *Bankruptcy Act*. If there is no such jurisdiction the sheriff will be placed in a position of great hardship. The Court of Chancery formerly exercised a jurisdiction in interpleader analogous to that of the Common Law Courts: *Child* v. *Mann* (1).

*Finlay Knight*, for the execution creditor.

*Doria*, for the claimant:—

This is the first attempt to set up such a jurisdiction in the Bankruptcy Court. Sect. 65 must be read in conjunction with sect. 72, which shews that the jurisdiction given to the Court of Bankruptcy is only with reference to any insolvent estate coming within its cognisance.

(1) Law Rep. 3 Eq. 806.

[JESSEL, M.R. :—Of course sect. 65 must be read as conferring the jurisdiction only with reference to the objects of the Act. The Court of Bankruptcy is not empowered to grant a divorce.]

The sheriff ought to have applied to one of the Common Law Divisions of the High Court.

JESSEL, M.R. :— Judgment, Jessel, M.R.

I think that the order asked for ought to have been made. The simple question is whether the *London* Court of Bankruptcy has jurisdiction to make it. That Court has directed certain costs to be paid, and, in order to enforce the payment, has, in accordance with the provisions of the Rules, issued a writ of *fi. fa.* against the person who was ordered to pay the costs. Under that writ the sheriff has seized some goods in the house of the execution debtor, and another person has claimed the goods which have been seized. The question who is entitled to them must be tried in some way. Is it to be tried in a quick, cheap, and convenient way, or in a lengthy, costly, and inconvenient way? The sole question is whether the jurisdiction to try it in the former way has been conferred on the Court of Bankruptcy. When you look at the words of sect. 65, I think it is reasonably clear that it has. The jurisdiction in interpleader was conferred by the Act 1 & 2 Will. 4, c. 58, ss. 1, 6, on all Her Majesty's Superior Courts of Common Law at *Westminster*. Then came sect. 65 of the *Bankruptcy Act*, 1869. Of course that section must be read with reference to the subject-matter of the Act. It does not confer on the Chief Judge the jurisdiction of the Court of Admiralty. But, for the purposes of the *Bankruptcy Act*, it gives him all the jurisdiction of the Superior Courts of Common Law. One of the purposes of the *Bankruptcy Act* is certainly the compelling the payment of costs which that Court has ordered to be paid. Why should we cut down the words of sect. 65? Why should we say that they are not to have their natural meaning and enable the Chief Judge to protect his own officer in the execution of his duty? I think that both convenience and the meaning of the words point the same way, and that we ought to hold that the *London* Court of Bankruptcy has this jurisdiction.

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Judgment, James, L.J.

JAMES, L.J.:—

I am entirely of the same opinion. Whether we consider the *London* Court of Bankruptcy as a Court of Law or as a Court of Equity, it appears to me that it must have this jurisdiction. The Courts of Common Law had the jurisdiction by statute, and the Court of Chancery followed them in exercising a similar jurisdiction. I am of opinion that it is a proper jurisdiction for the Court of Bankruptcy to exercise, and I think it is within the words and the plain intent of sect. 65.

Bramwell, L.J.

BRAMWELL, L.J.:—

I am of the same opinion. Before the statute of Will. 4 there was this grievous injustice to the sheriff: If he made a return of *nulla bona* to the writ, and the execution creditor brought an action against him, he might be left to pay the execution creditor out of his own pocket; and, on the other hand, if he seized the goods and sold them, he might have to pay the adverse claimant out of his own pocket. To obviate this injustice the very reasonable Act of Will. 4 was passed, which enabled the sheriff to say to the opposing parties, Fight the matter out between yourselves. Then the *Bankruptcy Act* empowered the Court of Bankruptcy to issue writs of *fi. fa.* What reason can be assigned why the same interpleader jurisdiction should not be given to the Bankruptcy Court with reference to those writs? Absolutely none; but every reason why it should be given. These are the considerations with which we approach the construction of sect. 65. What can be plainer than its words, and what reason is there why we should cut down their meaning? On the contrary, there is every reason why we should apply them to a case to which, without any extension of their meaning, they are clearly applicable.

The appeal was allowed, and an interpleader order was made in the common form.

Solicitor for Sheriff: *W. Maynard.*
Solicitor for Execution Creditor: *H. Aird.*
Solicitor for Claimant: *S. T. Cooper.*

## *In re* WEST JEWELL TIN MINING COMPANY.

### WESTON'S CASE.

C. A. 1879 Feb. 4.

*Company—Winding-up—Director—Misfeasance—Purchase of Vendor's fully paid-up Shares at a Discount—Onus of proving when Purchase was made—Admission of further Evidence on Appeal—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 165—*Rules of Court*, 1875, *Order* LVIII., *r.* 5.

The articles of association of a company authorized the directors to carry out an agreement which had been previously entered into for the purchase of a mine upon the terms of 5000 fully paid-up shares of the nominal value of £2 each being allotted to the vendor, his nominee or nominees, as the purchase-money. The agreement was registered under the provisions of sect. 25 of the *Companies Act*, 1867. The directors, at their first meeting after the registration of the company, adopted the agreement, by resolving that, in accordance with it, 5000 fully paid-up shares should be allotted to the vendor and his nominees. Of the 5000 shares, 500 were, on the nomination of the vendor, allotted to *W.*, one of the directors, who was present at the meeting.

In the subsequent winding-up of the company, the liquidator applied to the Court, under sect. 165 of the *Companies Act*, 1862, for an order that *W.* should pay the nominal value of the 500 shares. In answer to the application *W.* deposed that he purchased the 500 shares from the vendor in the regular way of business, paying him £500 for them, which was at the time considered their full value. He did not, however, say when the purchase was made. A share dealer deposed that, at the time when the contract was adopted, there was no market for the shares of the company, and that £1 per share was a large price to pay for them. The books of the company shewed that at that time a number of shares were allotted (some to the directors themselves, including *W.*) on the terms of payment in cash of the par value. There was no other evidence. When the application was made to the Court the vendor was dead:—

*Held*, that the onus of proving whether the purchase of the 500 shares was made before or after the directors had adopted the agreement lay upon *W.*, and that in the absence of evidence to the contrary it must be taken to have been made before the adoption of the agreement:

*Held*, therefore, that *W.* had in effect received from the vendor a bribe to the amount of the value of the shares beyond the sum which he had paid for them, which made it his interest to adopt the agreement, and prevented him from exercising an unbiassed judgment on behalf of the company, and that he must contribute to the assets of the company the value of the shares, less the £500 which he had paid for them:

*Held*, also, that, under the circumstances, the value of the shares must be taken to have been the nominal par value:

*Held*, also, that *W.*, being the only living person who was acquainted with

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the transaction, could not be allowed on the hearing of the appeal to give his own oral testimony to prove that he purchased the shares after the agreement had been adopted by the directors.

THIS was an appeal from a decision of the Vice-Warden of the Stannaries Court.

On the 6th of April, 1870, an agreement in writing was entered into between *M. C. Greene* (called the vendor), of the one part, and *J. B. Freeman*, as trustee for and on behalf of the *West Jewell Tin Mining Company* (called the purchaser), of the other part, whereby it was agreed that as soon as that company, which was then intended to be formed, should have been duly formed and registered, and the directors should have legally adopted and accepted the agreement to the satisfaction of the vendor, and have proceeded to an allotment of shares in the company, the vendor would, when required by a board of directors of the company, and on payment of the purchase-money as thereinafter mentioned, assign and transfer to the company the lease of a mining property situate at *Gwennap* in *Cornwall*, and known as the *West Jewell Sett*. Upon the transfer and assignment being made, the company were to pay to the vendor for the purchase of the property the sum of £10,000, by the delivery to the vendor, his executors, administrators, or assigns, or his nominee or nominees, of 5000 fully paid-up shares of £2 each in the company. On the shares being handed over to him, the vendor was to deliver possession of the property to the company.

The company was registered at *Truro* on the 11th of April, 1870. The agreement of the 6th of April was also duly registered under the provisions of sect. 25 of the *Companies Act*, 1867. The memorandum of association fixed the nominal capital of the company at £20,000, in 10,000 shares of £2 each. The memorandum was subscribed by (amongst other persons) *J. B. Freeman* for 300 shares, and *James Weston* for 500 shares, 1100 shares being subscribed for altogether. The articles of association stated the agreement of the 6th of April, and authorized the directors to carry it out. They also provided that the first directors of the company should be *Freeman*, *John Little*, and *Weston*. The first meeting of the directors was held on the 17th of June, 1870.

*Freeman, Little,* and *Weston* were present, *Weston* being in the chair. The following resolution was passed:—

"That the 5000 fully paid-up shares in the company agreed to be given in payment for the purchase of the mine, in accordance with the contract dated the 6th of April, 1870, be and are hereby allotted to the vendor and his nominees."

The resolution did not mention the names of any nominees, but the 5000 shares were all allotted to the vendor and different persons nominated by him, and the property was handed over to the company. The directors did not adopt the contract with *Greene* otherwise than by passing the above resolution. Of the 5000 fully paid-up shares 500 were allotted to *Weston,* 500 to *Little,* and 300 to *Freeman.* Besides the shares for which the memorandum of association was subscribed, 900 shares were allotted to applicants on the terms of their becoming liable to pay £2 per share. On the 10th of August, 1877, an order was made to wind up the company. In April, 1878, the official liquidator, alleging that *Weston* had been guilty of a misfeasance, or breach of trust in relation to the company, applied to the Stannaries Court for an order that he should shew cause why he should not be ordered to pay to the liquidator £1000, the amount of capital represented by the 500 fully paid-up shares allotted to him. This order having been made, *Weston* made an affidavit in which he said: "I purchased, in the regular way of business, of *Greene* 500 of the shares so allotted to him, and which were allotted direct to me by the company, under and pursuant to the contract which provided for the issue of the shares either to *Greene* or his nominee or nominees, and the 500 shares so purchased by me were issued to me as the nominee of *Greene,* and I received from the company the usual certificate that the shares were issued as fully paid up. I paid *Greene* the sum of £500 for the said 500 shares, which at the time was considered their full value. I never parted with any of the said shares since I purchased them from *Greene,* and I never made one farthing of profit by them." *Hartley Waddington,* a stock and share dealer in the city of *London,* made an affidavit in which he said that he had been well acquainted with the details of the company from its registration, and that in June, 1870, there was no

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market whatever for its shares, and the sum of £1 per share was at that time a large price to pay for them. No other evidence was adduced. *Weston* was not cross-examined. *Greene* was dead. The Vice-Warden made an order that *Weston* should pay to the liquidator the sum of £500, being the amount of capital represented by the 500 shares after deducting the £500 which *Weston* had paid to *Greene* for them. *Weston* appealed.

Argument.

*Roxburgh*, Q.C., and *Woodroffe*, for the Appellant:—

All the previous cases of the kind, such as *Pearson's Case* (1), are cases where a director has had fully paid-up shares given to him by a promoter for nothing, or where a vendor or promoter has in fact paid for a director's shares; this is the first case in which it has been held that a director is liable to pay for shares which he has bought at their full market value. The evidence proves that the full market value was given. *Greene* might have sold the shares to anybody else for what he pleased; he was the absolute master of them. And, the contract being registered, the shares could properly be treated as fully paid up.

[JESSEL, M.R.:—It is for *Weston* to shew when the purchase was made. If he bought the shares before the directors adopted the agreement, he had, to the extent of the value of the shares above what he gave for them, an interest in adopting the agreement, and was not in a position to exercise his judgment on behalf of the company whether it should be adopted.]

He was not cross-examined. But he can now give oral evidence that he bought the shares after the agreement had been adopted, and the Court has power, under Rules of Court, 1875, Order LVIII., rule 5, to admit further evidence.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

I do not think we ought to admit such evidence. I do not mean to impute to Mr. *Weston* that he would say anything but the truth, but it is too dangerous, after we have indicated what the point of the case is, to allow the only living man who can give evidence to testify in his own favour. If there had been any

(1) 5 Ch. D. 336.

written evidence we should have been very glad to admit it. Independently of anything like intentional untruth, it would depend very much on Mr. *Weston's* recollection of the circumstances, whether a conversation took place just before or just after a meeting. His interest is altogether one way, and he now knows the exact point which he has to meet.

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JAMES and BRAMWELL, L.JJ., concurred.

James and Bramwell, L.JJ.

*Roxburgh*, Q.C., and *Woodroffe* :—

Argument.

At any rate, on the evidence as it stands, it must be taken that the full value was given for the shares. *Weston* subscribed the memorandum of association in April. If the shares were then worth their par value, it does not follow that they were of the same value in June.

*Higgins*, Q.C., and *C. H. Turner*, for the official liquidator, were not heard.

JESSEL, M.R. :—

Judgment, Jessel, M.R.

I am quite unable to assent to interfering with the decision of the Vice-Warden.

The case is a very simple one. The vendor of the mine was to have £10,000 in 5000 fully paid-up shares of £2 each. One of the original directors, a signatory of the memorandum of association, was Mr. *Weston*, and he agreed to take 500 shares, for which he was to pay £2 a piece, not immediately, but 10*s.* down, and the rest when called for. He took them therefore at their par value. The agreement with the vendor was properly registered, and the articles of association authorized the directors to adopt it. They were authorized only to adopt it; it was not made binding by the articles. A meeting of the directors was held in June. Mr. *Weston* was present. At that meeting they did not formally adopt the agreement in so many words, but they adopted it by carrying it out and allotting the shares accordingly to the vendor and his nominees. Among those nominees we find the name of Mr. *Weston* for 500 shares. Upon that evidence, if it is not met by him, of course he would be liable for the value of the 500

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shares, inasmuch as he took them from the vendor, he being at that time in a fiduciary position towards the company, being one of their trustees to adopt or reject the agreement. That is not disputed. But the Appellant seeks to disprove the statement that he had received a present or bribe from the vendor, by saying that he purchased the shares in the regular way of business from *Greene*, and that he gave £500 for them, which he says was their full value at the time. There is also the evidence of Mr. *Waddington*, the broker, as to the value, who, it must be observed, does not say whether he is speaking of fully paid-up shares or of non-fully paid-up shares, but leaves it entirely in blank what kind of shares he means.

Now, upon that evidence, I think that the Appellant does not meet the charge. He is bound to shew that he bought these shares after he had performed his duty to the company as director in adopting the contract with the vendor. If he agreed to buy them before that adoption, he was receiving a present from the vendor of the excess of the value of the shares over the £500 which he was to give for them, and, as the obligation is upon him as a trustee to shew that he acted properly, he should have proved a fair purchase for value after the date of the allotment of the 5000 shares, which was the date of the adoption of the agreement with the vendor. He has done nothing of the kind. It appears to me that so far the Vice-Warden has arrived at a correct conclusion, that the Appellant has not shewn a *bonâ fide* purchase at the right period to relieve him from liability.

Now, then, as to the value of the shares. At that time not only, as in *Pearson's Case* (1), were there other shares allotted to other people at par, but Mr. *Weston* himself was agreeing to take shares at par, and so were his co-directors, and in the books of the company they treat all the shares as worth the par value. What ought the Judge below to have done in such a case? He was bound to adopt the rule laid down by the Court of Appeal in *Pearson's Case* and other cases, that when a director or any person in a fiduciary position accepts a present of this kind, he is to be charged with and compelled to make good the full possible value of the present or bribe at the time. The full possible value—the

(1) 5 Ch. D. 336.

Court is not to endeavour to reduce the value. Then what was the full possible value of these shares under the circumstances? Clearly the par value, and that is the decision at which the learned Vice-Warden arrived, and I think correctly.

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I will say one word more as to the application which was made to allow Mr. *Weston* to give further evidence. That was rejected by the Court on grounds which I think are sufficiently manifest. It was his duty to give the evidence, if it could be produced, in the first instance. It would be too dangerous to allow a man's single uncorroborated testimony (for Mr. *Greene*, it appears, is dead) to be admitted in his own favour after the turning point of the case has been made manifest; and, without at all imputing to Mr. *Weston* the slightest desire to state anything but the truth, in a transaction which occurred so long ago as this, as to which memory alone can hardly be relied upon, we must remember that he would be biassed by his interest to recollect, or to believe that he recollected, that the transaction took place at a particular hour of the day which would make it legal, and not at an earlier hour which would make it illegal. I think that under such circumstances we should be exercising our discretion improperly if we were to allow the witness to give further evidence.

James and Bramwell, L.JJ.

JAMES and BRAMWELL, L.JJ., concurred.

Solicitor for Appellant: *R. W. Stacpoole.*
Solicitor for Liquidator: *E. Beall.*

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1879
Feb. 6.

## *Ex parte* STAPLETON. *In re* NATHAN.

*Contract for Sale of Goods on Credit—Bankruptcy of Purchaser before Delivery—Right of Vendor to resell—Right of Trustee to complete on paying Cash—Proof in Bankruptcy for Deficiency on Resale—Costs of Appeal—Trustee in Bankruptcy Respondent.*

When the purchaser of goods sold on credit becomes bankrupt before the vendor has parted with the possession of the goods, the trustee in the bankruptcy has a right to elect to complete the contract by paying the agreed price in cash within a reasonable time. But, if he does not do so, the vendor is entitled to treat the contract as broken, and to resell the goods, without first tendering them to the trustee.

And the vendor is entitled to prove in the bankruptcy for damages for the breach of contract, the measure of damages, if the market is falling, being the difference between the contract price and the price obtained on the resale.

*Semble*, that a sub-purchaser from the bankrupt would also be entitled to an option to complete the original contract on tendering the agreed price in cash within a reasonable time.

A trustee in bankruptcy who is respondent to a successful appeal will not be ordered to pay costs personally.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 10th of December, 1877, *Henry Stapleton*, of *Peterborough*, entered into a contract to sell to *W. S. Nathan*, a commission merchant in *London*, "the cargo of mixed maize of fair average quality of crop, 1876, to be shipped from *Baltimore* or *Philadelphia*, by the ship *Lucie*, 803 tons, at the price of 30*s.* per quarter of 480 lbs., including freight and insurance to any safe port in the *United Kingdom* or continent between *Havre* and *Hamburg* (buyer paying extra freight and insurance), calling at *Queenstown*, *Falmouth*, or *Plymouth* for orders as per charterparty. Buyer has option of ordering vessel direct to any safe port in the *United Kingdom* on signing bill of lading, in which case price to be 3*d.* per quarter less, say 29*s.* 9*d.* per 480 lbs. Payment by buyer's acceptance to shipper's or seller's drafts at sixty days' sight, payable in *London*, with documents attached."

On the 19th of January, 1878, *Nathan* filed a liquidation petition, and a receiver and manager of his business was appointed. At this time the *Lucie* was still on her voyage between *Baltimore*

and *England*, and the bill of lading, which had been made out to the order of *Stapleton*, was still in his possession. On the 22nd of January the receiver wrote to *Stapleton*, informing him of his appointment, and requesting him to forward a statement of his claim against *Nathan's* estate. On the 24th of January the receiver wrote again to *Stapleton* as follows:—

"The Court of Bankruptcy having yesterday made an order vesting in me power to deal with the open contracts for the purchase of grain, I am desirous to exercise that power in accordance with the views and wishes of the creditors of the estate. I therefore venture to invite you to meet a few of the other principal creditors [at a place and time mentioned] to consider the course that should be adopted with regard to those contracts."

On the 25th of January *Stapleton* replied that he would attend the meeting. At the meeting the following resolution was passed:—

"That it be an instruction to the receiver and manager that he be at liberty, on application by the vendors of the various contracts for purchase which have not been resold by Mr. *Nathan*, to consent to a resale of the same at the discretion of the said vendors."

On the 30th of January the receiver sent a copy of this resolution to *Stapleton*, at the same time saying, "I am ready to entertain any proposal you may wish to make with regard to your contract with Mr. *Nathan* dated the 10th of December, 1877."

On the 31st of January *Stapleton* replied:—

"I propose to sell at a time when I shall consider most advisable, and then claim on the estate for the loss. Have you any proposal to make?"

On the 6th of February *Stapleton* entered into a contract to sell the cargo to *Schröder, Walsh, & Co.* for £5457 13*s.* 4*d.*, that being the best price which he could then obtain in the market, which was falling. The loss on this price as compared with that which *Nathan* had agreed to give amounted to £688 12*s.* 5*d.*

On the 7th of February the receiver, in reply to *Stapleton's* letter of the 31st of January, wrote thus:—

"I beg to point out to you that you have no power or right to

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deal with the cargo under the contract of the 10th of December, 1877, in any other way than that of tendering the same to me on behalf of *Nathan's* estate in the ordinary manner. It is only such vendors as make application to me in the terms of the resolution that I am at liberty to authorize to resell."

Statement.

On the 8th of February *Stapleton* replied:—

"Yours to hand. I inclose invoice, and tender you *Lucie*, awaiting your instructions."

The *Lucie* had not then arrived in *England*.

On the 9th of February the receiver replied:—

"I shall not be able to give instructions, or to accept or to refuse your tender until after Tuesday next, when the committee of the estate will meet. In the meantime, I think it right to draw your attention to the fact that it is positively stated to me that you have sold this cargo to Messrs. *Schröder & Co.* Until this matter is finally disposed of I beg to reserve all the rights of the estate without prejudice."

On the 11th of February *Stapleton* replied:—

"Seeing *Nathan* was quite insolvent, I was not obliged to make any tender."

On the 12th of February the receiver (who had then been appointed trustee) replied:—

"I decline to recognise the tender of the *Lucie* cargo as in any way a fulfilment of your contract of the 10th of December, 1877, you having sold that cargo to other parties before tendering same to me, and I reserve my right to regard such contract as cancelled by your having made such sale, should I see fit so to do."

The sale to *Schröder & Co.* was afterwards completed, and *Stapleton* then tendered a proof against the estate of *Nathan* for £688 12*s.* 5*d.*, the amount of his loss on the resale. The trustee rejected the proof, and his decision was affirmed by the Registrar. *Stapleton* appealed.

Argument.

*Finlay Knight*, for the Appellant:—

The filing of the liquidation petition amounted in effect to a repudiation of the contract, and entitled the vendor to resell: *Ex*

*parte Chalmers* (1); *Morgan* v. *Bain* (2). If the trustee had any right to complete the contract, he has expressly abandoned it. The contract for resale would not have prevented the vendor from completing the original contract; he would only have been exposed to an action for damages by *Schröder & Co.* By reselling the vendor took the best course for all parties.

[BRAMWELL, L.J., referred to *Mirabita* v. *Imperial Ottoman Bank* (3).]

*R. Vaughan Williams,* for the trustee:—

*Ex parte Chalmers* and *Morgan* v. *Bain* only shew this, that neither party to a contract can bring an action for a breach of it without first himself performing all the obligations imposed on him by it. The trustee in the purchaser's bankruptcy cannot therefore call on the vendor to deliver the goods in exchange for acceptances of the bankrupt, but must tender cash.

[JESSEL, M.R.:—Do not those cases shew that notice of the bankruptcy of the purchaser is notice of his insolvency?

JAMES, L.J.:—Is not the bankruptcy in itself a breach of the contract? The bankrupt disables himself from performing it. The trustee, no doubt, may elect to perform it.]

The vendor has no right to resell unless he first tenders the goods to the trustee, and he rejects them. Here there was no tender of anything but the invoice; the cargo itself ought to have been tendered after it arrived. Onerous contracts of a bankrupt pass to his trustee, though he can disclaim them under sect. 23 of the *Bankruptcy Act,* 1869. If there is any right of proof it is only a right to prove for damages for the breach. The loss on the resale cannot be said to be damage resulting from the repudiation of the contract by the trustee, which happened after the contract for the resale had been entered into.



JESSEL, M.R.:—

The real question is whether there has been any breach of contract on the part of the liquidating debtor, and if so, when the

(1) Law Rep. 8 Ch. 289. (2) Law Rep. 10 C. P. 15.
(3) 3 Ex. D. 164.

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breach accrued. The sale of the cargo was for a price to be paid by acceptances which were to be given by the debtor. Long before the cargo arrived the insolvency of the debtor was known, and was announced to the vendor. What was the consequence to him? It would be absurd to suppose that he, not having then parted with the cargo, was bound to part with it in exchange for acceptances of the debtor which were worthless, or nearly so. But, if the insolvency of the debtor was not a breach, the contract would assume that complexion. I am of opinion that if a person who has entered into a contract of this kind gives to the vendor before he has parted with the goods that which amounts in effect to this notice, "I have parted with all my property, and am unable to pay the price agreed upon," it is equivalent to a repudiation of the contract. Of course that would not affect the right of the trustee in the liquidation to elect to fulfil the contract on paying the price in cash, provided that he does so within a reasonable time. But, if he does not do that, I think that the vendor is entitled to treat the contract as broken, without making any tender of the goods to the trustee. If that be so, and the contract is broken, the damages for the breach are plainly, if the market is falling, the difference between the contract price and the price obtained on the resale. The proof for the £688 must therefore be admitted, and the appeal be allowed with costs.

James and Bramwell, L.JJ.

JAMES and BRAMWELL, L.JJ., concurred.

JESSEL, M.R.:—We do not wish to be understood as saying that a sub-purchaser from the debtor might not also elect to fulfil the contract by tendering the price in cash within a reasonable time.

JAMES, L.J.:—The order will be for the payment of costs out of the estate, not by the trustee personally. The trustee is not the Appellant.

Solicitors for Appellant: *Williamson, Hill, & Co.*, agents for *V. Stapleton, Stamford.*

Solicitors for Trustee: *Simpson & Cullingford.*

## *Ex parte* WINGFIELD. *In re* FLORENCE.

C. A. 1879 Feb. 6.

*Reputed Ownership—Order and Disposition—Goods sent on Sale or Return—Notorious Trade Custom—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.

In order that goods of another person in the possession of a bankrupt should pass to his trustee under the latter words of sub-sect. 5 of sect. 15 of the *Bankruptcy Act*, 1869—as goods of which the bankrupt "has taken upon himself the sale or disposition as owner"—it is necessary that the bankrupt should have been the reputed owner of the goods.

The effect of a notorious trade custom in excluding the operation of the reputed ownership clause, considered.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

*George Florence* was a greengrocer and also a horsedealer in a small way of business. He was adjudicated a bankrupt on the 22nd of August, 1878. On the 15th of August, *W. A. Sewell*, a horse-dealer, had sent to him a bay gelding on sale or return. This horse was in the bankrupt's possession at the time of the adjudication, and it was claimed by the trustee as having passed to him under the reputed ownership clause. *Sewell* claimed to have the horse delivered up to him, and applied to the Court for an order accordingly.

*Sewell* deposed that he had been for thirty years engaged in the trade of horsedealing, and was well acquainted with the customs of that trade, and he said, "It is one of the well-known customs of that trade to intrust men with horses on sale or return, and it is always usual to allow them to have the horses in their own possession, so that they can exhibit them to intending purchasers." The existence of this custom was deposed to by several other persons engaged in the trade of horsedealing, one of the witnesses saying that it was a well-known and universal custom in the business "for persons engaged therein to intrust horses with horse-dealers and other persons who sell horses, and to allow such horses to remain in their possession for a considerable period on sale or return, so that they can shew them to intending purchasers." And another witness said, "It is not assumed in the business that

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because a horse is in the stable of a dealer for a week or two it is the property of the dealer."

In opposition to this evidence, several horsedealers made affidavits on behalf of the trustee, in which they said, "Horsedealers are in the habit of assisting one another to supply customers with any particular kind of horse that may be required, by lending individual horses to one another for the purpose of being shewn to customers, but such arrangements are essentially temporary, and no custom exists to leave horses for a lengthened period in the possession of any other person for the purpose of selling them. If a horse is known to remain at a dealer's stable for weeks together, and to be shewn from time to time to customers with a view of sale, it is assumed that such horse is the property of the dealer." One of the witnesses added that, in the whole of his experience in horsedealing, which had extended over twenty-five years, he did not recollect an instance where a horse was intentionally left in the possession of another dealer for more than a day or two at the outside, and then only for the purpose of being shewn to a particular customer.

The horse had been sold for £70.

The Registrar held that the custom had been sufficiently proved, and he ordered the trustee to pay the £70 to *Sewell*. The trustee appealed.

Argument.

*De Gex*, Q.C., and *W. H. Clay*, for the Appellant:—

The alleged custom is not sufficiently proved. It ought to be proved not only that persons engaged in the particular trade knew of its existence, but that the debtor's ordinary creditors were likely to be aware of it: *Ex parte Powell* (1). In *Livesay* v. *Hood* (2) it was held that goods in the hands of a retail dealer on sale or return at the time of his bankruptcy passed to his assignees under the reputed ownership clause, 21 Jac. 1, c. 19, s. 11. But under the words of sect. 15 of the *Bankruptcy Act*, 1869 (3), it is not in

(1) 1 Ch. D. 501, 508.

(2) 2 Camp. 83.

(3) Section 15 provides that the property of the bankrupt divisible among his creditors shall comprise (*inter alia*),

Sub-section 5: "All goods and chattels being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which

such a case as the present even necessary that the bankrupt should have acquired the reputation of ownership. If, within the meaning of the latter part of the clause, "he has taken upon himself the sale or disposition as owner" of goods in his possession with the consent of the true owner, that is enough. Those words exactly meet the case of goods sent on sale or return. *Whitfield* v. *Brand* (1) supports this view. *Hamilton* v. *Bell* (2) and *In re Bell* (3) are also in favour of it.

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*Winslow*, Q.C., and *Creed*, for *Sewell*, were not heard.

JESSEL, M.R.:—

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This is an attempt in the year 1879 to alter the universal opinion as to the meaning of this section. It has always been called the "reputed ownership" clause. Since the passing of the Act 6 Geo. 4, c. 16, there has been no substantial difference in the words. They were intended to meet the case of a man obtaining credit from being seen in possession of another person's property as his own, and the true owner is to lose his property by reason of his having allowed this credit to be given. That is the real meaning of the section, and the words have been always so understood. Let us consider, then, what is the position of a man who has goods sent to him on sale or return. He receives the goods from the true owner with an option of becoming the owner, which can be exercised in one of three ways—by buying the goods at the price named by the vendor; by selling the goods to some one else, which is taken to be a declaration of his option; or by keeping them so long that it would be unreasonable that he should return them. If he sells or attempts to sell the goods, he does not do so as owner, but as having the option of taking them if he sells them. It does not, therefore, advance the matter at all, unless it is shewn that he becomes the reputed owner of the goods. But if there is a custom of trade so notorious that all persons engaged

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goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner."

(1) 16 M. & W. 282.
(2) 10 Ex. 545.
(3) 47 L. J. (Bkcy.) 33.

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in the trade, or who give credit to those who are engaged in it, know that the possession of goods by the trader does not necessarily shew that he is the owner of them, then it cannot be said that the creditor gives credit on the faith of the trader's ownership of the goods which are in his possession, and the provisions of sect. 15 do not apply. The only question, therefore, is whether sufficient proof has been given of the existence of such a custom in the trade of horsedealers. I think there has. A horse, the property of one *Sewell*, had been sent to the bankrupt on sale or return only seven days before the adjudication. It is said that, according to the universal custom of the trade, horses are sent in this way on sale or return, and that, therefore, the possession of a horse does not confer on the possessor the reputation of ownership. The witnesses on the part of the trustee say that the custom is not so wide as it is stated by the witnesses for the Respondent; but none of them say that the fact that a horse is kept for seven days in the possession of a dealer will justify the belief that it is his property. There is really, therefore, no conflict in the evidence, and I think that the order of the Registrar was right.

James, L.J.

JAMES, L.J.:—

The argument pressed upon us is this: that sect. 15 is so stringent in its terms, that, when once you find that goods have been sent on sale or return, under no possible circumstances can you contradict the positive enactment. Even if a man had written up over his door, so that it must be known to everybody who dealt with him, "I sell horses which have been sent to me on sale or return," or if he placed a placard on a particular horse, stating that it had been sent to him on sale or return, that would not be sufficient. The section must, however, be read, as the similar provision in the bankruptcy statutes from the time of *James* I. has always been read, with some attention to common sense. It has always been construed as meaning this: that if goods are in a man's possession, order, or disposition, under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have

given the credit. But, if no such credit has been given, then the maxim applies, *Cessante ratione cessat ipsa lex.*

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BRAMWELL, L.J.:—

I am of the same opinion.

Solicitors for Trustee: *Denton, Hall, & Fox.*
Solicitor for Respondent: *A. Leslie.*

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## *Ex parte* POSTMASTER-GENERAL. *In re* BONHAM.

C. A. 1879 Feb. 6, 7.

*Construction of Statute—Prerogative of Crown—Extent—Liquidation Petition—Appointment of Receiver—Relation back of Trustee's Title—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 11, 13, 32, 49, 65, 72, 125—*Bankruptcy Rules*, 1870, *rr.* 260, 262.

Though the Crown is named in some of the sections of the *Bankruptcy Act*, 1869, it is not bound by the other provisions of the Act.

In particular, the relation back of the title of the trustee in a liquidation to the filing of the petition does not affect the rights of the Crown under an extent issued against the property of the debtor between the filing of the petition and the appointment of a trustee.

Notwithstanding the filing of a liquidation petition and the appointment of a receiver by the Court on the application of the debtor, his property remains vested in him as before, until the creditors have determined what they will do, and the property is bound by an extent issued by the Crown between the filing of the petition and the appointment of a trustee.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

*G. W. Bonham* and *James McDonnell* were auctioneers. On the 21st of September, 1878, they filed a liquidation petition, and on the same day, on their application, supported by some of their creditors, the Court appointed a receiver and manager of their estate and business. The same day the receiver took possession of the debtors' property, and proceeded to carry on their business.

The debtors had been employed by the Postmaster-General to sell old stores belonging to the Post Office Department, and at the time when the petition was filed there was due from them, in respect of sales which they had made for the Post Office, a balance of £896 7*s.* 5*d.* Notice of the appointment of the receiver and

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Statement.

manager was on the 24th of September sent to all the creditors, including the Postmaster-General. On the 27th of September the Postmaster-General obtained from Mr. Justice *Hawkins* a fiat for the issue of an immediate writ of extent against the debtors, their estate and effects. This order was made upon an affidavit of the Receiver and Accountant-General of the Post Office, which stated the filing of the petition and the appointment of the receiver and manager, and that the deponent believed that the debt of £896 7*s.* 5*d.* was in danger of being lost, unless some more speedy course than the ordinary method of proceeding should be forthwith taken to recover the debt on behalf of the Crown. The writ was tested on the 27th of September. It was placed in the hands of the Sheriff of *Middlesex* on the 15th of October, and he on the same day seized some goods of the debtors of which the receiver had taken possession on the 21st of September. On the 16th of October the receiver applied to the Court of Bankruptcy for an order restraining the Postmaster-General from taking any further proceedings under the writ of extent, but, inasmuch as the first meeting of the creditors was to be held on the 17th of October, the hearing of the application was adjourned to the 26th of October, the Postmaster-General undertaking that in the meantime no further proceedings should be taken under the extent, and the receiver undertaking not to sell or remove any of the goods which had been seized. On the 17th of October the creditors resolved on a liquidation by arrangement, and appointed the receiver trustee. On the 26th of October the matter came again before the Bankruptcy Court on an application by the trustee that the sheriff should be ordered to withdraw from possession of the goods seized under the extent, and to deliver up possession of them to the trustee as being his property as against the Postmaster-General, and for an order to restrain the Postmaster-General from prosecuting any further proceedings under the extent. The Registrar made an order declaring that, notwithstanding the fiat of the 27th of September and the writ of extent issued thereon, and the seizure by the sheriff under the writ, the goods seized were the property of the trustee and formed part of the estate of the debtors divisible among their creditors, and he ordered the sheriff to deliver up possession to the trustee.

The Registrar was of opinion that by the act of the debtors in filing the petition and applying for the appointment of a receiver a *quasi* trust was created in favour of the general body of creditors, which so altered the nature of the debtors' interest in their property as to defeat the extent.

The Postmaster-General appealed.

Argument.

Sir *H. S. Giffard*, S.G., and *Casserley*, for the Appellant:—

The Court of Bankruptcy had no jurisdiction in the matter. There is nothing in the *Bankruptcy Act*, 1869, to take away the jurisdiction of the Exchequer Division. The Crown has a right to have all questions affecting its revenue determined in that Court, the practice of which affords an ample opportunity to a person who claims goods seized under a writ of extent to contest the right of the Crown: *Manning's* Exchequer Practice (1); *Chitty's* Prerogative of the Crown (2).

[JESSEL, M.R., referred to *Tidd's* Practice (3).

JAMES, L.J., referred to *West* on Extents (4).]

Secondly, the Crown is not bound by the general provisions of the *Bankruptcy Act*, 1869. It is well settled that an extent binds that which is legally and equitably the property of the Crown debtor at the time when the writ is issued: *Giles* v. *Grover* (5).

If the debtor has alienated or charged his property before the issue of the writ, the right of the Crown is defeated. But it has always been held under previous bankruptcy statutes that the relation back of the title of an assignee in bankruptcy to an act of bankruptcy anterior to the fiat or adjudication cannot affect the rights of the Crown: *Attorney-General* v. *Capel* (6). The question is whether the property remained vested in the debtors when the writ of extent was issued. No alteration in this respect has been made by the *Bankruptcy Act*, 1869. It is true that the Crown is named in sects. 32 and 49 (7), but that does not shew

(1) 2nd Ed. pp. 90 *et seq.*
(2) Pages 358 *et seq.*
(3) 9th Ed. pp. 1076 *et seq.*
(4) Pages 193 *et seq.*
(5) 9 Bing. 128; 1 Cl. & F. 72.
(6) 2 Show. 480.
(7) Section 32 provides that certain debts therein mentioned (including all assessed taxes, land tax, and property or income tax assessed on the bankrupt up to the 5th of April next before the date of the order of adjudication, and

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that the Crown is bound by the other sections of the Act. Sect. 32 does no more than give priority to certain Crown debts; it takes away no right of the Crown. Sect. 49 is intended to preserve the rights of the Crown. But for that it might have been said that, if the Crown had come in and proved in a bankruptcy, it had elected to stand in the same position as the other creditors. Sects. 65 and 72 only give a large jurisdiction to the Court of Bankruptcy in cases where it has jurisdiction. The general rule is that the Crown is not bound by a statute unless expressly mentioned or referred to by necessary implication: *Chitty* on Prerogative (1); *Giles* v. *Grover* (2); *In re Henley & Co.* (3); *Corporation of Weymouth* v. *Nugent* (4).

Thirdly, the filing of the petition coupled with the appointment of the receiver on the application of the debtors did not in any way change their interest in their property, or even create a charge upon it for the benefit of their creditors. The creditors might have agreed to a composition, and then the property would certainly have remained vested in the debtors. So it would if the creditors had met and passed no resolution at all, so that the proceedings became abortive. If the creditors resolve on a liquidation by arrangement, or the debtor is adjudicated a bankrupt, then when a trustee is appointed, the property of the debtor vests in him, or

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not exceeding in the whole one year's assessment) "shall be paid in priority to all other debts. Between themselves such debts shall rank equally, and shall be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves." And, "save as aforesaid, all debts provable under the bankruptcy shall be paid *pari passu*."

Section 49: "An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts provable under the bankruptcy with the exception of (1) Debts due to the Crown; (2) Debts with which the bankrupt stands charged at the suit of the Crown, or of any person, for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff, or other public officer, on a bail bond entered into for the appearance of any person prosecuted for any such offence; and he shall not be discharged from such excepted debts unless the Commissioners of the Treasury certify in writing their consent to his being discharged therefrom."

(1) Page 383.

(2) 9 Bing. 277.

(3) 9 Ch. D. 469, 481.

(4) 6 B. & S. 22.

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it vests in the Registrar if no trustee is appointed by the creditors. But, till the creditors resolve on something, or an adjudication is made, the debtor's property remains vested in him as before, and therefore it is affected by an extent. The receiver takes no estate in the property; he merely has the custody of it as an officer of the Court. Reliance will, no doubt, be placed on *Ex parte Jay* (1), where a receiver is spoken of as a trustee. But it is clear from the judgment of Lord *Selborne* that he did not mean that a receiver is a trustee for the creditors in the strict sense of the word; he only meant that he fills a fiduciary character. *Ex parte Jones* (2) does not assist the argument for the trustee. It shews that there is no relation back, even as against an ordinary creditor, in the case of a composition being agreed to.

*Benjamin*, Q.C., and *Bigham*, for the trustee:—

The *Bankruptcy Act*, 1869, binds the Crown. Sect. 13 enables the Court at any time after the presentation of a bankruptcy petition to "restrain further proceedings in any action, suit, execution, or other legal process" against the debtor. The words "other legal process" are sufficient to include an extent. In the case of liquidation by arrangement a similar power is conferred by rule 260 of the Bankruptcy Rules, 1870. Then sects. 32 and 49 shew that the Legislature had in its contemplation the rights of the Crown, and this is enough to exclude the general rule that the Crown is not bound by a statute unless it is expressly named. Sect. 32 expressly gives priority to (*inter alia*) certain Crown debts, and provides that all other debts but those to which the priority is given are to be paid *pari passu*. Sect. 49 is a direct consequence of sect. 32; if sect. 49 had not expressly provided otherwise, it might have been said that the bankrupt's discharge had released him from Crown debts. When an Act deals with one subject-matter, the Crown is bound by the whole Act if its rights are affected by any one section: *Moore* v. *Smith* (3). The old decisions that the Crown was not affected by the relation back of the title of an assignee in bankruptcy applied to a time when an assignment had to be executed in order to vest the bankrupt's property in the assignee. Under the present Act the property of the bankrupt vests in the

(1) Law Rep. 9 Ch. 133. (2) Law Rep. 10 Ch. 663.
(3) 28 L. J. (M.C.) 126.

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trustee by virtue of his appointment: sect. 17; and then by sect. 11 the title of the trustee relates back to the act of bankruptcy on which the adjudication is founded, or even to a prior act of bankruptcy. The adjudication, or, in the case of a liquidation by arrangement, the appointment of the trustee, amounts to a judgment that at the time when the act of bankruptcy was committed the debtor ceased to have any property. In *Giles* v. *Grover* (1) the question was whether an extent could prevail against an execution previously levied by a private creditor under a *fi. fa.*, and, though the point had been previously considered doubtful, the majority of the Judges held that the seizure by the sheriff under a *fi. fa.* did not alter the property of the execution debtor, or create any charge or lien on his property, but that it only deprived him of the right to the possession of the goods, and therefore the right of the Crown under the extent was not affected.

But when a debtor himself files a liquidation petition by which he confesses that he is unable to pay his debts, and asks to be allowed to liquidate his affairs by arrangement, and then upon his own application a receiver is appointed by the Court, there is in effect a *cessio bonorum* by him for the benefit of his creditors, or, at any rate, such a charge or lien is created on his property in favour of his creditors as to exclude the right of the Crown under an extent subsequently issued. When a receiver has been appointed, either by the Court under rule 260, or by the creditors under rule 262, rule 263 provides that "the Court may at any time cancel his appointment by consent of the debtor and of the creditor or creditors (if any) upon whose application the appointment was made, and of any creditor or creditors whose proceedings may have been restrained as aforesaid, or if the Court shall see fit." That shews that by the appointment of the receiver the creditors have acquired an interest in the debtor's property; and a lien or charge on it is quite enough to exclude the Crown.

*F. C. Willis*, for creditors.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

The question we have to decide appears to me to be a very simple one. The first point to be considered is what is the

(1) 9 Bing. 277.

general law on the subject of the prerogative of the Crown. Now on that I think there is no dispute whatever. The general rule, as expressed in *Bacon's* Abridgment (1), is, "that where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King shall be bound by such Act, though not particularly named therein; but where a statute is general, and thereby any prerogative, right, title, or interest is devested or taken from the King, in such case the King shall not be bound, unless the statute is made by express terms to extend to him." That is the general rule. And the point came before the Court of Exchequer in *Attorney-General* v. *Donaldson* (2), and there Baron *Alderson,* in delivering the judgment of the Court, said (3), "It is a well-established rule, generally speaking, in the construction of Acts of Parliament, that the King is not included, unless there be words to that effect." Now, the question we have to consider really comes to this, are there "words to that effect" in the *Bankruptcy Act,* 1869? and we must remember that, if it is intended to make a clear and strong alteration of the law, you expect to find clear and strong words to effect that alteration. Up to the time of the passing of the Act with which we are dealing, it is hardly contended that the Crown was bound by the Bankruptcy Acts. It was not mentioned in the old Acts, and the relation back of the title of the assignee, which was the creation of statute, did not affect the Crown, which was not bound by the statute. It is said that the Crown is now bound by the statute. For that purpose we must look at the wording of the new statute. The Crown is said to be bound under the operation of three or four sections. First of all we may look at the 13th section, which gives power to the Court to restrain proceedings and appoint a receiver;—"The Court may at any time after the presentation of a bankruptcy petition against the debtor restrain further proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt provable in bankruptcy. . . . The Court may also at any time after the presentation of such petition appoint a receiver or manager of the property or business of the debtor

(1) 7th Ed. p. 462. (2) 10 M. & W. 117.
(3) Page 123.

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[1]Judgment, Jessel, M.R.

against whom the petition is presented, or of any part thereof, and may direct immediate possession to be taken of such property or business, or any part thereof." Now, I may observe on that section that it does not appear to me that it can apply to the Crown when you look at the wording of it. If it had been intended to interfere with the rights of the Crown, I do not think the words "restrain further proceedings in any action" would have been used. Some mode would have been pointed out in which the Crown's rights were to be interfered with, because no lawyer would imagine that a clause allowing you to restrain proceedings in an action would apply when the Crown was the Plaintiff in the action. It appears to be that, so far as that section goes, the wording of it is against the contention that it applies to the Crown.

Then there is the 32nd section, which provides that certain debts, including assessed taxes, land tax, and income or property tax, shall be paid in priority, and as between themselves shall rank equally, and that all other debts provable under the bankruptcy shall be paid *pari passu*.

Now it is quite true that assessed taxes, land tax, property or income tax, are Crown debts, and this section does to that extent affect certain kinds of Crown debts, but does it shew that the rest of the Act, the other provisions of it where the Crown is not named, are intended to apply to the Crown? It only shews this, that in the distribution of the bankrupt's property by the trustee certain preferences are given, including these particular Crown debts and no others, and of course "debts provable under the bankruptcy" must mean, not only debts provable properly so called, but debts which the creditor comes in and proves, and of course, if he does not take the benefit of the section, he does not get anything under it. He does not get a debt which is not proved.

The only other section to which our attention was called is the 49th, and the effect of that section is that the discharge of the bankrupt is not to release him from any Crown debt except with the assent of the Crown, "unless the Commissioners of the Treasury certify in writing their consent to his being discharged therefrom." That again is an option given to the Crown, and to

that extent no doubt it affects the Crown. It gives the Crown the benefit of the option, and that is all. It does not appear to me, when we look at those sections, that there is anything in them to shew that the Crown is intended to be bound by any of the other sections of the Act, and deprived of its undoubted prerogative. As I said before, looking at the wording of them, I should rather come to the opposite conclusion. If that is so, what is the result? If the property was the property of the debtor at the time of the issuing of the writ of extent, the Crown remains entitled.

The only other argument adduced on behalf of the trustee was this, that there had been in substance a *cessio bonorum* effected by the presentation of the liquidation petition and the appointment of a receiver. Now it is quite clear that the Crown can only take under a writ of extent the property of the debtor at the time of the issue of the writ; if the debtor has assigned or transferred his property, of course the Crown cannot take it. Therefore it is necessary to consider what the effect of the presentation of the petition is. The presentation of such a petition by a debtor is undoubtedly a request by him to be allowed to liquidate his affairs by arrangement and not to be made a bankrupt, but he is not allowed to present the petition except on condition that he shall admit his insolvency and thereby commit an act of bankruptcy, so that if the creditors think fit they may make him a bankrupt on the petition. But that is not his desire; it is a condition imposed upon him, so to say, against his will. After the petition is presented he may apply to the Court for the appointment of a receiver, as he has done in this case, but the appointment is made by the Court. If he does not apply, the creditors themselves may appoint a receiver. Then the next step is this, either the creditors may agree to a liquidation by arrangement, or they may agree to take a composition, or they may do nothing, or they may make the debtor a bankrupt. In two out of the four cases the property remains in the debtor—in the case of composition and the case of nothing being done; in the other two cases the property vests by relation back in the trustee appointed by the creditors. But, until one course or another is taken, there is no devesting of the property, but it remains in the debtor. Until the creditors determine what is to be done, there cannot, as

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it appears to me, be anything in the shape of a parting with his property or a *cessio bonorum* by the debtor. In other words, the potentiality of something happening afterwards to devest the property is not a parting with his property by the debtor so as to prevent the extent of the Crown affecting that property. It appears to me, on these grounds, that the appeal ought to be allowed.

Judgment, James, L.J.

JAMES, L.J.:—

I am entirely of the same opinion. In the early part of the argument of the Solicitor-General I was trying to arrive at the conclusion that this could be construed into an equitable *cessio bonorum*. But I cannot see my way, on any legal principle, to arrive at such a result from what took place. At the utmost it is an offer to do something which may result at some future time, on the happening of some contingency, in a *cessio bonorum*. But the offer to part with the goods is not a parting with them so as to prevent the Crown, which has a legal right, from taking the goods in the meantime.

Bramwell, L.J.

BRAMWELL, L.J.:—

I am of the same opinion.

Solicitor for Appellant: *W. H. Ashurst.*
Solicitors for Trustee: *Stevens, Bawtree, & Stevens,* Witham.
Solicitor for Creditors: *James Davis.*

## *In re* EDWARDS.

C. A.
1879
*Feb.* 12.

*Infant of Unsound Mind—Jurisdiction.*

The Vice-Chancellor of the County Palatine of *Lancaster* having declined to give directions as to whether an infant ward of Court who was alleged to have become of unsound mind should or should not be kept at a lunatic asylum, on the ground that the Court had no jurisdiction to inquire whether he was of unsound mind or not:—

*Held*, on appeal, that the jurisdiction of the Court over its infant ward was not taken away by any physical or mental disability to which the infant might be subject, and that such directions ought to be given as to his treatment as the Court considered to be most for his benefit.

Statement.

THIS was an appeal by *Eyre Evan Edwards*, an infant, by the Rev. Canon *Hume*, one of his guardians, as next friend, and by Canon *Hume*, from a decision of the Vice-Chancellor of the County Palatine of *Lancaster*.

*John Edwards*, of *Liverpool*, died shortly before 1873, leaving a widow, *Eliza Evans*, and four infant children, of whom *Eyre Evan Edwards* was the youngest. He left no property, but under a settlement the infants were entitled as tenants in common in tail in possession, with cross remainders between them in tail, to a moiety of certain estates in *Ireland*.

On the 10th of August, 1874, an order was made by the Court of Chancery of the County Palatine of *Lancaster* for a reference to appoint guardians and to fix an allowance for the maintenance and education of the infants. By an order dated the 3rd of November, 1874, Canon *Hume*, *P. Thompson*, and Mrs. *Edwards* were appointed guardians of the persons and estates of the infants, and a scheme for their maintenance and education was approved. *P. Thompson* having died, Canon *Hume* and Mrs. *Edwards* were appointed guardians by order dated the 16th of August, 1876. The children resided with their mother.

In 1878 an application was made by the infants by Canon *Hume*, as their next friend, stating that *Eyre Evan Edwards* had fallen into a state of great bodily prostration and had become of unsound mind, and objecting to the course which Mrs. *Edwards* was pursuing as to his management. Several medical men visited him,

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and differed as to the course to be adopted. By an order made on the 12th of August, 1878, it was directed that Dr. *Cameron*, an eminent medical man, should visit the boy and report on his state. Dr. *Cameron* made his report on the 15th of August, 1878, stating that it was essential to the restoration of the boy's health that he should be removed from the house where he was, and recommending that he should be placed at an institution specially adapted for the treatment of such cases, and he instanced the *Royal Albert Asylum* for infants and imbeciles as a proper institution.

Provisional arrangements having been made by Canon *Hume* with the authorities of the above-named institution for receiving the boy, an order was made on the 3rd of September, 1878, by the deputy of the Chancellor of the County Palatine for the transaction of vacation business, directing the guardians to take the necessary steps for placing the boy at the asylum, and fixing an allowance for the maintenance there. The making of this order was opposed by Mrs. *Edwards*, who objected to the boy's being taken from under her care, but in obedience to the order she gave up the custody of him, and Canon *Hume* placed him at the asylum on the 5th of September.

The application on which the order of the 3rd of September, 1878, had been made was brought before the Vice-Chancellor for further discussion, Mrs. *Edwards* again insisting that the boy ought not to be taken from under her care. The Vice-Chancellor, on the 3rd of February, 1879, came to the conclusion that he had no jurisdiction to deal with the application so far as related to the continuance or otherwise of the infant *E. E. Edwards* at the asylum, and declined to give any directions upon that subject, except that any of the parties were to be at liberty to make any such application as they might be advised with reference thereto to the competent jurisdiction (1).

(1) 1879. Feb. 3.

LITTLE, V.C.:—

As respects the application which concerns the male infant exclusively, this Court possesses no jurisdiction to try the question in dispute between the two co-guardians, as to whether the infant is or is not of unsound mind, or to give directions for his retention in or dismissal from a lunatic asylum. In connection with this subject, however, I wish to add that the argument at the Bar satisfied me upon a point upon which I had previously entertained some doubt, viz., what was the precise effect

The infant and Canon *Hume* appealed.

*North*, Q.C., and *Clare*, for the appeal:—

We submit that the jurisdiction which the Court has over an

upon the jurisdiction of this Court of the 23rd section of the *County Palatine Act* of 1850, which abolished the jurisdiction previously existing in this Court in cases of lunacy. Prior to the passing of the Act the Court had jurisdiction (within its limits) of issuing and executing commissions of lunacy and of dealing with the persons and estates of persons found lunatic by inquisition. I think that the section in question merely abolishes that jurisdiction, and leaves the subject-matters of it to be dealt with by the general lunacy jurisdiction of the country. I think, therefore, that the Court, as a Court of Equity, still possesses the same powers which the High Court of Chancery formerly possessed, and which are now exercised by the Chancery Division of the High Court of Justice, over the estates of lunatics not so found by inquisition, in cases in which moneys have been paid into Court, or where trusts are being executed by the Court.

It was pressed upon me at the Bar, that, assuming the Court to possess that jurisdiction, the case of *Vane* v. *Vane* (2 Ch. D. 124) shews that the Court has power to deal with the case of the male infant in the manner proposed by the application before me. By the 12th and 13th sections of the *Lunacy Regulation Act*, 1862, certain powers are vested in the Lord Chancellor in his character of a delegate of the Crown in matters of lunacy, to deal with the estates of insane persons not found lunatic by inquisition for the benefit of those persons in cases in which the property is very small, the limits of property being cases in which the incomes do not exceed £50, or the capital values £1000. In *Vane* v. *Vane*, the question before the Court was with reference to a lady of unsound mind not so found by inquisition; no question existed as to that being her true condition, and the friends of the lady desired to avoid proceedings in lunacy. The lady was entitled to an annuity of £175, which arose out of trust funds which were proposed to be brought into Court, and under the circumstances of that case the Master of the Rolls, after dealing with the subject of jurisdiction, and stating that the Court possessed original jurisdiction in a case such as that before him where there had been no inquisition of lunacy, and after referring to the provisions of the *Lunacy Regulation Act*, proceeded to say that, though the property in the case before him exceeded the limits mentioned in that Act, he would still be willing to exercise the original jurisdiction of the Court in the case, if there was no opposition by the friends of the lady and no question as to the custody of her person. He was assured by counsel that there was no such question, and thereupon he did proceed to appoint a guardian to that lady, and gave directions upon the subject of her maintenance. But that case is, I think, if not as different as possible, still most importantly different, from the case before me. I have before remarked that I have no application before me intituled in the matter of the infant treated as a person of unsound mind, and as suing by a guardian or next friend, charging

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infant is not taken away by the infant's becoming of unsound mind.

[JAMES, L.J.:—It would be very inconvenient if it was; for if no person took proceedings in lunacy the infant would be left without any protection at all. Moreover, I am not aware that I

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himself with the representation of the infant's interests while labouring under that state of mental incapacity. But if the difficulty were merely that Canon *Hume* has not so described the infant in the application before the Court, that difficulty might be got over by an amendment of the title of his notice of motion.

But the next thing is, that I have before me a dispute between the co-guardians as to whether the child is mentally incompetent or not, and I have no jurisdiction to decide that dispute.

Then, again, consider the position of the infant as to the question of his fortune. To say nothing of his interests in personal estate, which are or may be of considerable value, he is legally entitled (not entitled under a trust merely) to his share in the Irish estates, producing a rental, say, at present of £370 per annum, and with a probability of the income from that source being increased by the dropping of terminable annuities which now burden the estate. The statute law applicable both in *England* and *Ireland* contemplates and provides for the case of lunatics or alleged lunatics possessed of properties of this character and amount being dealt with by the lunacy jurisdictions, and not by Courts of equitable jurisdiction merely. It rests with the English jurisdiction in lunacy to say whether, under the circumstances of this case, a commission of lunacy shall or shall not be issued. If a commission shall be directed to issue, the status of the infant will depend upon the return to that commission, and in case the infant is found a lunatic, the government of his person and his property will be attracted to the lunacy jurisdiction in this country either conclusively or conjunctively with the corresponding jurisdiction in *Ireland*.

The conclusion at which I find myself compelled to arrive therefore makes it proper that I should now declare, that this Court does not possess jurisdiction to deal with the application so far as it relates to the continuance or otherwise of the infant *Eyre Evans Edwards* at the *Royal Albert Asylum for Idiots and Imbeciles*, and that the Court doth not think fit to give any directions upon that subject, except that any of the parties are to be at liberty to make any such application they may be advised to make with reference to that subject to the competent jurisdiction or jurisdictions.

I give that latter direction because without it Canon *Hume*, as a guardian of the infants appointed by this Court, might feel embarrassed as respects his future course of action. I fully anticipate, and indeed I desire, that the order which I am now making should be reconsidered elsewhere. No doubt the advisers of the parties will consider in what form any ulterior proceeding for such purpose should be shaped, that is to say, whether as a mere appeal from my order to the Court of Appeal, or as an appeal combined with an application to the jurisdiction in lunacy.

ever heard of a petition in lunacy against an infant. Is there any authority in support of the view that unsoundness of mind takes away the jurisdiction which exists, on the ground of infancy?]

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The authorities are the other way: *In re Arrowsmith's Trusts* (1); *Beall* v. *Smith* (2).

*F. Thompson*, for the mother, stated that he did not contend that there was no jurisdiction.

JAMES, L.J.:—

Judgment, James, L.J.

With all deference to the Vice-Chancellor, I think that he has jurisdiction, and ought to exercise it. The Court has jurisdiction over an infant as such, and it is no answer to say that the infant is subject to some other physical or mental disability, any more than it would be to say that the infant was only a week old and might turn out to be imbecile. In considering what is best for the infant, the Vice-Chancellor is obliged to consider something collateral, viz., what is the infant's state of mind. This does not, in my opinion, in any way affect his jurisdiction or his duty to provide in the best way he can for the treatment and education of the infant.

BRAMWELL and BRETT, L.JJ., concurred.

Bramwell and Brett, L.JJ.

Solicitors: *Field, Roscoe, & Co.; Worthington Evans & Cook.*

(1) 4 Jur. (N.S.) 1123; 6 W. R. 642. (2) Law Rep. 9 Ch. 85, 92.

C. A.

1879

Feb. 13.

## *Ex parte* FLETCHER. *In re* HART.

*Court of Bankruptcy—Jurisdiction—Foreclosure—Sale of Mortgaged Property of Bankrupt—Bankruptcy Act*, 1869 (32 & 33 *Vict.* c. 71), *ss.* 65, 72—*Bankruptcy Rules*, 1870, *r.* 78.

An order having been made by the Court of Bankruptcy foreclosing the trustee of a bankrupt in respect of leasehold property mortgaged by the bankrupt, six months being allowed for redemption, the mortgagee appealed, insisting that, as the trustee had admitted that he had no assets of the bankrupt other than the equity of redemption of the mortgaged property, only one month ought to be allowed for redemption:—

*Held*, that the trustee was entitled to six months in which to redeem:

*Held* also, that, no application having been made by the mortgagee to the Registrar for a sale of the property under rule 78 of the Bankruptcy Rules, 1870, an order for sale could not be made on the appeal without the consent of the trustee.

Observations on the jurisdiction of the Court of Bankruptcy with regard to foreclosure.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

The bankrupt, *H. W. Hart*, had mortgaged some leasehold property to *J. F. Fletcher*. The legal estate in the lease was vested in *Fletcher* absolutely, but it was admitted that, subject to the mortgage, he was only a trustee of the lease for the bankrupt. The bankrupt had executed a second mortgage of the property. On the 25th of July, 1878, the Court of Appeal, on an application by *Fletcher* for an order to foreclose the trustee, ordered that, in default of the trustee paying into Court within fourteen days the amount claimed by *Fletcher*, the trustee should deliver possession of the property to him (1). Under this order possession was on the 9th of August, 1878, given to *Fletcher*. On the 21st of November he applied to the Bankruptcy Court for an order of foreclosure against the trustee. He deposed that there was due to him altogether about £863, and that he believed that the mortgaged premises were not worth anything like that amount. This evidence was not contradicted. The trustee appeared and admitted that he had no assets, other than the equity of redemption, and also that the second mortgagee had been paid off. The Registrar thereupon expressed his intention of making an order

(1) 9 Ch. D. 381.

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for foreclosure in default of payment by the trustee within one month from the Registrar's certificate of the balance due upon the security. Afterwards, upon the drawing up of the order, the Registrar altered the period for payment to six months.

*Fletcher* appealed, asking by his notice of appeal that the Registrar's order might be varied by limiting the time for payment to one month.

Argument.

*W. Latham*, for the Appellant:—

Under the circumstances only a month ought to have been given to the trustee to redeem.

[JAMES, L.J.:—Has the Court of Bankruptcy any jurisdiction to make an order for foreclosure? What possible good can it do to any of the creditors of the bankrupt?]

As long as my debt subsists I have a right of proof against the bankrupt's estate; a foreclosure would end the matter, except at the risk of reopening the foreclosure. When the case was before this Court on the former occasion Lord Justice *James* said (1): "With regard to foreclosure, I do not like to say now that the Court of Bankruptcy has no jurisdiction to order it, for it is very desirable that every question relating to the property of a bankrupt should, if possible, be determined by one Court, but such an order has never, I believe, yet been made by the Court of Bankruptcy. In the present case this difficulty is suggested, that there is a second mortgagee, who is not before the Court, and therefore we do not think it desirable to go further than the order I have already mentioned. But I wish to leave the question open, and not absolutely to abjure the jurisdiction."

[JAMES, L.J.:—I do not see what you gain by coming to the Court of Bankruptcy. You might have issued a writ and delivered a statement of claim in a few lines. The trustee need not have appeared; if he had, he would have got no costs.]

Our object was expedition; the property is of no value unless some money is laid out upon it. The trustee wants the mortgagee to spend money on it, and then, when its value has been improved, to redeem it.

(1) 9 Ch. D. 385.

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[JAMES, L.J.:—What jurisdiction has the Court of Bankruptcy?]

Sect. 65 gives it "all the powers, jurisdiction, and privileges" of the Court of Chancery. The mortgagee submits to the jurisdiction, and the Court has complete jurisdiction over the trustee.

[BRAMWELL, L.J.:—Does not sect. 65 merely mean that those powers are conferred on the Bankruptcy Court in all matters which are within its jurisdiction?

JAMES, L.J.:—At any rate, why should the ordinary period of six months be abridged?]

The trustee admits that he has no assets but the equity of redemption.

[JAMES, L.J.:—He may be able to raise the money.]

He should not be allowed to use the period of six months for purposes of extortion. At any rate, under rule 78, the Court of Bankruptcy has power to order the property to be sold, and can give the mortgagee liberty to bid. He would prefer that if an order for immediate foreclosure is not made.

[JAMES, L.J.:—The fact that that rule gives the Bankruptcy Court power to sell mortgaged property tends to shew that it was not intended that it should give foreclosure.]

The Court of Chancery used to order a sale in place of a foreclosure. If the mortgagee has liberty to bid he is quite willing that the trustee should have the conduct of the sale.

*Hume Williams*, for the trustee:—

No application was made to the Registrar for a sale.

*W. Latham*, in reply:—

If the Registrar had said at first that he should allow six months, I should have asked for a sale in preference.

Judgment, James, L.J.

JAMES, L.J.:—

We must leave the Registrar's order as it is, and, indeed, if a foreclosure order was to be made, it seems to me that six months was the right period to fix. We cannot consider that an application for a sale was made to the Registrar merely because it was intended to make it if he had expressed a different opinion from

that which he did express. We cannot therefore make an order for sale now, unless the trustee will consent to it. I desire to repeat what I said before as to the jurisdiction. The appeal will be dismissed with costs.

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Judgment, Bramwell and Brett, L.JJ.

BRAMWELL and BRETT, L.JJ., concurred.

Solicitor for Appellant: *J. Wilson Heritage.*
Solicitor for Trustee: *W. R. Preston.*

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## *In re* HARKER. GOODBARNE *v.* FOTHERGILL.

C. A. 1879 *Feb.* 17.

[1876 H. 343.]

*Practice—Setting down Appeal—Rules of Court*, 1875, *Order* LVIII., *r.* 8.

An interlocutory order having been made in an action on the 3rd of April, the Defendants on the 23rd of April gave notice of appeal for the 30th of April. The order was not drawn up till the latter end of June, and the Defendants then set down the appeal. Upon its coming on to be heard the Plaintiffs objected that it could not be heard, as it had not been set down in time:—

*Held*, that as it was the duty of the Plaintiffs to draw up the order, and the appeal had been set down as soon as the Plaintiffs had enabled the Defendants to comply with the requisition of Rules of Court, 1875, Order LVIII., rule 8, that an office copy of the order shall be produced, the objection could not be sustained.

Statement.

THIS was an appeal by the Defendants, the executors and trustees of the will of *W. S. Harker*, from an order of Vice-Chancellor *Bacon*, made on further consideration and upon applications by the Plaintiffs and Defendants to vary the Chief Clerk's certificate.

By the order in question, dated the 3rd of April, 1878, the certificate was varied in several particulars, and consequential directions were given.

On the 23rd of April, 1878, the Defendants gave notice of appeal to vary the order so far as it varied the certificate on the several points mentioned in the notice, and to have such variations as might be requisite made in the consequential directions. The notice was given for the 30th of April. The appeal was not set

C. A. 1879 — *In re* HARKER. GOODBARNE v. FOTHERGILL.

down till the 28th of June. It was admitted in Court by the Plaintiffs' counsel that the order under appeal was not drawn up till June, shortly before the setting down of the appeal. The appeal now came on to be heard.

Argument.

*Swanston*, Q.C., and *Bissill*, took the preliminary objection that the appeal could not be heard, as it had not been set down before the time for which notice of appeal was given: Rules of Court, 1875, Order LVIII., r. 8; *In re National Funds Assurance Company* (1); *Rhodes* v. *Jenkins* (2). A fresh appeal would be too late: *White* v. *Witt* (3).

*Hemming*, Q.C., and *Tremlett*, *contrà*:—

The appeal could not be set down till after the order had been drawn up, since the Registrar will not set it down unless an office copy of the order is produced: Order LVIII., r. 8. It was the duty of the Plaintiffs to draw up the order.

*Swanston*, in reply:—

The notice of appeal was premature. The Appellants ought to have waited till the order had been drawn up. The time for appealing does not run till that time.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that there is nothing in the objection. The notice of appeal was given earlier than was necessary, for it might have been given at any time within twenty-one days after the drawing up of the order. The order of which the Respondents had the carriage was not drawn up till June, and the appeal was set down as soon as they enabled the Appellants to comply with the requisitions of Order LVIII., rule 8. The case is one in which the Respondents ought not to be allowed to take advantage of a delay occasioned by themselves.

Bramwell and Brett, L.JJ.

BRAMWELL and BRETT, L.JJ., concurred.

Solicitors: *Collyer-Bristow, Withers, & Russell; C. P. Deane.*

(1) 4 Ch. D. 305. (2) 7 Ch. D. 711. (3) 5 Ch. D. 589.

## *Ex parte* HALL. *In re* WHITTING.

C. A. 1878
C. J. B. *Nov.* 4.
C. A. 1879 *Feb.* 27.

*Equitable Assignment—Future Rent—Interest in Land—Parol Agreement for Loan—Statute of Frauds, s.* 4.

A customer, in July, borrowed £200 from his bankers upon the terms of a verbal agreement that the loan should be repaid out of the rent of a farm which would become due to him at Michaelmas. The money was advanced by the bankers, and the customer then gave them a letter addressed by him to the tenant of the farm, by which he authorized and requested the tenant, when his Michaelmas rent became due, to pay £200 to the bankers. The letter contained no reference to the loan, and did not shew that any consideration had been given for the authority. The bankers sent the letter to the tenant. The customer was adjudicated a bankrupt upon an act of bankruptcy committed in August:—

*Held*, that as the rent was an interest in land, the agreement was one which, by virtue of sect. 4 of the *Statute of Frauds*, could not be proved by parol evidence, and that therefore the letter could alone be looked at.

And, *held*, that the letter amounted only to a revocable authority to pay the rent to the bankers, and that it was revoked by the bankruptcy.

*Brice* v. *Bannister* (1) approved.

Statement.

ON the 18th of July, 1877, *William Whitting*, who was the owner of a farm, which was let on lease to Messrs. *Horrell*, gave to his bankers, Messrs. *Hall & Co.*, a letter dated the 16th of July, 1877, signed by him and addressed to Messrs. *Horrell*, as follows:—

"Dear Sirs,—When your Michaelmas rent becomes due to me, I hereby authorize and request you to pay to Messrs. *Hall & Co.*, of *Brighton*, £200 to my credit, for which I will accept their receipt as so much of your rent discharged."

This letter was sent by *Hall & Co.* to Messrs. *Horrell*, and was received by them.

On the 11th of August, 1877, *Whitting* filed a liquidation petition, and he was afterwards adjudicated a bankrupt in the *Peterborough* County Court, the act of bankruptcy being the filing of the petition.

On the 21st of May, 1878, *Hall & Co.* applied to the County

(1) 3 Q. B. D. 569.

C. A. 1879 *Ex parte* HALL. *In re* WHITTING.

Statement.

Court for an order that Messrs. *Horrell* should pay the sum of £200 to them. Evidence was adduced which shewed that the letter of the 16th of July was written in pursuance of a verbal agreement made between the bankrupt and *Hall & Co.* on the 14th of July, 1877, by which they undertook to advance him £200 upon his charging Messrs. *Horrell's* Michaelmas rent with the repayment of the loan, and that the £200 had been actually advanced in pursuance of the agreement. The Judge ordered that Messrs. *Horrell* should pay £86 9*s.* 9*d.* to *Hall & Co.*, that being the balance of their Michaelmas rent, after certain deductions which they were entitled to make; but the order was expressly made without prejudice to any application which the trustee in the bankruptcy might make with reference thereto. On the 23rd of July the trustee applied to the County Court for an order declaring the letter of the 16th of July void as against him. The Judge refused the application, on the ground that the bankrupt had made a valid equitable assignment to *Hall & Co.* of part of the Michaelmas rent due from Messrs. *Horrell*, by which the trustee was bound.

The trustee appealed to the Chief Judge. The appeal was heard on the 4th of November, 1878.

Argument.

*Cookson*, Q.C., and *H. Percival*, for the Appellant, the trustee:—

The letter of the 16th of July, 1877, is an order for the payment of a sum of money, and is clearly within the definition of a bill of exchange given in sect. 48 of the *Stamp Act*, 1870, and being unstamped cannot be admitted as evidence: *Ex parte Shellard* (1). The County Court Judge, however, declined to decide this point, but relied on the previous parol agreement. The letter, not the parol agreement, should have been the ground of the decision, as the letter merely gives effect to the antecedent contract; the letter, however, cannot be put in evidence as it is unstamped. The County Court Judge attempted to sever the parol agreement and the letter, the result of it, and made his mistake by relying on *Ex parte Holthausen* (2), which never decided that any parol contract of a bankrupt could be carried into effect: that case was

(1) Law Rep. 17 Eq. 109. (2) Law Rep. 9 Ch. 722.

C. A. 1879 *Ex parte* HALL. *In re* WHITTING. Argument.

only decided as it was because there there was a charge on a present interest.

Next, assuming that this letter is not a bill of exchange, there is another objection, viz, that such an equitable assignment of such a contingent and future rent would not be good as against the trustee. The rent could only pass when acquired, and the rent when it became due was payable, not to the bankrupt, but to his trustee.

A good security might have been obtained by a charge on the reversion, but in the form in which it has been taken it cannot stand as against the trustee.

*Reginald Brown*, for the Respondents:—

This letter is not a bill of exchange, and *Ex parte Shellard* (1) has no application.

It is an absolute assignment of a legal *chose in action*, of which notice has been given to Messrs. *Horrell;* such an assignment was clearly binding on the bankrupt: *Brice* v. *Bannister* (2), and is equally binding upon his trustee.

Judgment, C. J. B.

BACON, C.J.:—

The proceeding in question is one which is not of unfrequent occurrence between bankers and their customers, and I do not impute any extraordinary astuteness to any one in order to enable him to detect an inaccuracy in what may be called securities for a debt, because I know that it is frequently the case that bankers lend their money upon very loose transactions, and, however hard the case may be against them, I think that men in their position should make some inquiry into the circumstances. Now what are the circumstances of this case? A man in want of money applies to his bankers and says, "I am the owner of a farm; the rent is payable next Michaelmas Day, and, if you will let me draw on you for £200, I will give you an order upon the tenant to pay you that amount out of the rent when it becomes due to me." That is the real transaction, and what does it amount to more than this, that a man says to his bankers, "I am entitled

(1) Law Rep. 17 Eq. 109. (2) 3 Q. B. D. 569.

C. A. 1879 *Ex parte* HALL. *In re* WHITTING. Judgment, C. J. B.

to receive some rent, and you shall have out of it £200 when it becomes due to me at Michaelmas"? Now what is that promise, and what equity does it carry with it? When the day came on which the rent was payable the man who had made the promise had no longer any interest in the rent. There was no rent due when he made the promise, and, when the time came and the rent was due, it was due to another man, that is, the trustee in bankruptcy of the man who had made the promise; and to say that the trustee in bankruptcy is bound by the promise which the bankrupt had previously made, would be, in my opinion, opposed to all the principles of the bankruptcy law. It is said that the bankrupt entered into an agreement of which the specific performance could be enforced. Try it by that test. Suppose that he had been charged to perform his promise to pay £200, how could he do so? It is impossible for him to do it, and the only thing that he could do would be to pay it out of rent which he would have no power to sue for and recover, for it is by law now vested in another man. To treat this promise as an agreement of which the specific performance could be enforced, would be, in my opinion, acting contrary to every rule of law.

With respect to the other point, upon which it is not necessary for me to touch, I mean the want of a stamp on the letter, I think it is by no means disposed of by the case of *Brice* v. *Bannister* (1). A ship-builder who has his workmen and materials, and is engaged in the daily operation of completing the ship, is entitled to deal with the moneys coming to him when the work shall be completed. That is a totally distinct thing from rent issuing out of land, when the whole thing has been forfeited and vested in some other person. I cannot find any ground upon which I can say that such an agreement has been entered into as can take away from the trustee his legal right to the Michaelmas rent. No doubt there is a promise which ought to be performed if the debtor had it in his power to perform it. The only answer which he has is, that the performance has become impossible; that he has become bankrupt, and that he is in no circumstances specifically to perform his promise. On every plain principle of law such a transaction as this between a bank and a customer, relating to rent not

(1) 3 Q. B. D. 569.

then due in respect of an estate to which the trustee became entitled before Michaelmas arrived, cannot be held to amount to a charge which can impose on the trustee the liability to perform that contract which the bankrupt himself would have had to perform if he had remained solvent.

C. A. 1879 *Ex parte* HALL. *In re* WHITTING.

From this decision the bankers appealed. The appeal was heard on the 27th of February, 1879.

C. A.

*Winslow*, Q.C., and *Reginald Brown*, for the Appellants:—

Argument.

The letter of the 16th of July created a good equitable charge on the rent, and the trustee in the bankruptcy takes only such interest as the bankrupt himself had. The letter was given to the bankers in pursuance of the prior agreement with them for the loan.

[JESSEL, M.R.:—That was only a verbal agreement. Rent is an interest in land. How do you get over sect. 4 of the *Statute of Frauds?*]

The agreement has been acted on by the actual advance of the money.

[JESSEL, M.R.:—That will not do.

JAMES, L.J.:—It is well settled law that payment of purchase-money is not a part performance which will take the case out of the statute. No consideration is expressed in the letter; it is a mere authority to pay the rent.]

*Ex parte Shellard* (1) is the only authority against us. *Diplock* v. *Hammond* (2) is in our favour.

[JESSEL, M.R.:—There the request was not a gratuitous one.]

In *Brice* v. *Bannister* (3) no consideration was stated in the letter which was held to be a good equitable assignment.

[BRAMWELL, L.J.:—That was an assignment of moneys due upon a contract for building a ship. No difficulty arose there about the *Statute of Frauds*. Here the agreement related to an interest in land, and there is no written evidence of it.]

(1) Law Rep. 17 Eq. 109. (2) 5 D. M. & G. 320.
(3) 3 Q. B. D. 569.

C. A. 1879 *Ex parte* HALL. *In re* WHITTING.

In *Nunn* v. *Fabian* (1) it was held that payment of one quarter's rent was part performance of an agreement for a lease sufficient to take the case out of the *Statute of Frauds*. The letter is a sufficient memorandum of the agreement to satisfy the *Statute of Frauds;* it is signed by the party to be charged.

Argument.

[JESSEL, M.R. :—It does not shew the essential terms.]

It need not shew all the terms; it is evidence of a contract. It is as good a contract as was that in *Fisher* v. *Calvert*, before your Lordship on the 20th of January last.

[JESSEL, M.R. :—There the contract was not within the *Statute of Frauds*.]

*Buck* v. *Robson* (2) and *Brice* v. *Bannister* (3) have in effect overruled *Ex parte Shellard* (4). This point was not taken in the County Court. It was contended there that the letter of the 16th of July was void, on the authority of *Ex parte Shellard*. The decision of the Chief Judge proceeded entirely on the ground that the rent, when it became due, was due, not to the bankrupt, but to his trustee. But how can the *Statute of Frauds* apply? There is no assignment of the rent; there is only a direction to pay £200 out of a sum of money which will become due at Michaelmas.

*Cookson*, Q.C., and *H. Percival*, for the trustee, were not heard.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R. :—

I think the decision of the Chief Judge ought not to be disturbed. The real arrangement between the bankrupt and the bankers was a verbal one, he agreeing, in consideration of an advance by them, to charge in their favour rent which was not then due. That is a contract charging an interest in land, and the *Statute of Frauds* prevents us from receiving parol evidence to shew what that verbal arrangement was. The only thing we can look at is the letter itself, which "authorizes and requests" the tenants to pay £200 to the bankers. It amounts to nothing more than a request to pay the bankers. On the face of it, it is simply an authority revocable at any time, and of course it was revoked

(1) Law Rep. 1 Ch. 35.
(2) 3 Q. B. D. 686.
(3) 3 Q. B. D. 569.
(4) Law Rep. 17 Eq. 109.

by the bankruptcy. It is said that it was in truth an equitable assignment, and not revocable, because it can be proved that it was given for value. The answer is, You cannot prove that, because the statute says that the agreement on which you rely must be evidenced by some writing. Consequently the Appellants are not entitled to rely on the verbal agreement. I ought to say that I can see no reason to differ from the decision in *Brice* v. *Bannister* (1).

Judgment, C. A. Jessel, M.R.

JAMES, L.J.:—

James, L.J.

I am of the same opinion. The Chief Judge held that the letter was a revocable authority to receive the rent, like the authority which a customer frequently gives to his banker to receive his dividends for him. To prevent the possibility of revocation it is necessary to prove the prior agreement, which is the only thing which gives the bankers any equity. But that agreement is one which creates a charge upon an interest in land, and therefore the *Statute of Frauds* applies, and prevents us from receiving parol evidence of the agreement.

BRAMWELL, L.J.:—

Bramwell, L.J.

I am of the same opinion.

Solicitors for Appellants: *Linklater, Hackwood, & Co.*

Solicitor for Trustee: *A. S. Hatchett Jones*, agent for *J. Graves, Peterborough.*

(1) 3 Q. B. D. 569.

C. A.
1878
C. J. B.
*Dec.* 9.
C. A.
1879
*Feb.* 27.

## *Ex parte* HILLMAN. *In re* PUMFREY.

*Trader—Voluntary Settlement — Leaseholds — Purchaser for Valuable Consideration—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 91.

The word "purchaser" in sect. 91 of the *Bankruptcy Act*, 1869, means a "buyer" in the ordinary commercial sense, not a purchaser in the legal sense of the word. Therefore, the trustee of a post-nuptial settlement of leaseholds for the benefit of the settlor's wife and children is not a purchaser of the property for valuable consideration within the meaning of sect. 91.

*Price* v. *Jenkins* (1) distinguished.

Statement.

ON the 1st of July, 1875, *J. H. Pumfrey*, a trader, executed a post-nuptial settlement whereby he, in consideration of the natural love and affection which he bore to his wife, assigned to trustees, on certain trusts for the benefit of his wife and children, two houses which he held under an underlease at a ground rent of £10, and the furniture and other effects mentioned in a schedule to the settlement, subject, as to the houses, to the payment of the rent reserved by, and to the performance and observance of the lessee's covenants and conditions contained in the underlease. The settlement contained a covenant by the settlor to pay the rent and to perform the covenants of the underlease, and to indemnify the trustees therefrom. There was no covenant by the trustees to pay the rent or to perform the covenants of the lease. The settlement was not registered under the *Bills of Sale Act*, and the chattels comprised in it remained in the apparent possession of *Pumfrey* when he, on the 23rd of February, 1877, filed a liquidation petition. On the 19th of March his creditors resolved to accept a composition, payable in instalments spread over eighteen months. He failed to pay some of the instalments, and he was on the 3rd of January, 1878, adjudicated a bankrupt. The trustee in the bankruptcy applied to the *Birmingham* County Court for an order declaring the settlement void as against him, under sect. 91 of the *Bankruptcy Act*, 1869. There was evidence, not contradicted, that, at the time when the settlement was executed, the settlor was solvent, and that he executed the settlement solely

(1) 5 Ch. D. 619.

C. A. 1879 *Ex parte* HILLMAN. *In re* PUMFREY.

Statement.

to secure a provision for his family, and not with the view of defrauding or delaying his creditors. He had purchased the two houses in the year 1873 for £1525, which was part of the proceeds of a legacy bequeathed to him by his mother. The Judge declared the settlement void as to the chattels, but held, on the authority of *Price* v. *Jenkins* (1) and *Ex parte Doble* (2), that good consideration had been given for the assignment of the two houses, because the trustees had become liable to pay the rent, and to perform the covenants, and that consequently the settlement was valid as regarded the houses. The trustee appealed to the Chief Judge. The appeal was heard on the 9th of December, 1878.

Argument.

*De Gex*, Q.C., and *Finlay Knight*, for the Appellant:—

No doubt there has been an attempt of late years to remedy the evils consequent on a long line of unfortunate decisions, by holding that any consideration, however small, will support an otherwise voluntary conveyance under the 27 Eliz. c. 4, as is shewn by the observations of Lord *Hatherley* in *Bayspoole* v. *Collins* (3). But the trustee's claim is based on sect. 91 of the *Bankruptcy Act*, 1869, a very different enactment from the statute of *Elizabeth*.

*Roxburgh*, Q.C., and *Tarleton*, for the Respondent:—

The statute 27 Eliz. c. 4, is not repealed by the *Bankruptcy Act*, 1869; and in *Price* v. *Jenkins* the Court of Appeal held that an assignment of leasehold property cannot be without consideration, because the assignee becomes liable to pay the rent, and perform the covenants of the lease, and that decision was followed by your Lordship in *Ex parte Doble*.

Judgment, C. J. B.

BACON, C.J.:—

No doubt there are a great many cases arising upon settlements in which the Court has endeavoured to ascertain what is and what is not an unfair transaction, by deciding the question what is a merely voluntary assignment. I have no inclination to interfere with any of those decisions, and least of all with the decision in *Price* v. *Jenkins*, which has been referred to by Mr. *Roxburgh*.

(1) 5 Ch. D. 619. (2) 26 W. R. 407.
(3) Law Rep. 6 Ch. 228, 232.

C. A. 1879 *Ex parte* HILLMAN. *In re* PUMFREY. Judgment, C. J. B.

But what has that case to do with the *Bankruptcy Act*, in which there is a special provision that a settlement made by a trader within two years of his bankruptcy, unless it is made before marriage, or in favour of a purchaser or incumbrancer, in good faith and for valuable consideration, shall be void as against the trustee in the bankruptcy? The present case does not fall within any of the exceptions, and there can be no doubt that the assignment in question is invalid as against the creditors of the bankrupt, and that the trustee ought to be declared entitled to the leaseholds as well as to the chattels.

C. A.

From this decision the trustees of the settlement appealed. The appeal was heard on the 27th of February, 1879.

Argument.

*Roxburgh*, Q.C., and *Tarleton*, for the Appellants:—

The decision of the Chief Judge is contrary to that of the Court of Appeal in *Price* v. *Jenkins* (1), as well as to his own decision in *Ex parte Doble* (2). The decision in *Ex parte Doble* was afterwards affirmed by this Court, though the hearing on appeal is not reported. According to *Price* v. *Jenkins*, an assignment of leaseholds cannot be without consideration, inasmuch as the assignee becomes liable to pay the rent and perform the covenants of the lease. Consequently the Appellants are within the meaning of sect. 91 of the *Bankruptcy Act*, 1869 (3), "purchasers in good faith and for valuable consideration" of the houses in question.

[JAMES, L.J.:—In *Ex parte Doble*, the persons in whose favour the settlement was made covenanted to pay an annuity of £50 to the settlor.

JESSEL, M.R.:—Both *Price* v. *Jenkins* and *Ex parte Doble* were decisions with reference to the statute 27 Eliz. c. 4. That Act

(1) 5 Ch. D. 619.

(2) 26 W. R. 407.

(3) Sect. 91 provides that "Any settlement of property made by a trader, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee of the bankrupt appointed under this Act."

deals only with fraudulent conveyances. That a voluntary conveyance is fraudulent is entirely Judge-made law. The later Judge-made law of *Price* v. *Jenkins* (1) corrected the former, so far as was possible at that time.]

The same principle applies. The Appellants are purchasers for value, equally with the trustees in *Price* v. *Jenkins*. The good faith of the transaction has not been challenged. It is not pretended that the settlor was not solvent at the date of the settlement. The houses were not purchased with money withdrawn from his business, but with the proceeds of the legacy.

Argument.

*De Gex*, Q.C., and *Finlay Knight*, for the trustee in the bankruptcy, were not heard.

JESSEL, M.R.:—

Judgment, C. A. Jessel, M.R.

It appears to me that the decision of the Chief Judge is clearly right. The only question is, what is the meaning of sect. 91? Now, in the first place, the *Bankruptcy Act* is a special code of law relating to bankruptcy, as a general rule for commercial men, and we must therefore expect to find words used in it in the sense in which commercial men use them. In the next place, that the words of sect. 91 are used in that sense is, I think, clear from the words themselves, independently of any other consideration. It is said that this settlement, made for the benefit of the bankrupt's wife and children, comes within the exception from the section. It is argued that, because the leasehold houses are subject to the payment of the rent and the performance of the covenants of the lease, therefore the trustees of the settlement are purchasers of the houses in good faith and for valuable consideration. It appears to me that this argument is not well founded. I think that in this section the word "purchaser" means a "buyer" in the ordinary commercial sense, not a purchaser in the legal sense of the word. That this is so is made obvious by the use of the other word "incumbrancer," for every incumbrancer is a "purchaser" in the legal sense. The two words "purchaser" and "incumbrancer" are contrasted with each other. It is impossible to say that in any sense of the word a trustee for the settlor's wife and children is a

(1) 5 Ch. D. 619.

C. A. 1879 *Ex parte* HILLMAN. *In re* PUMFREY.

"buyer" of the settled property. The present case, therefore, falls, not within the exception, but within the provision of sect. 91, and the decision of the Chief Judge must be affirmed.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I entirely agree. *Price* v. *Jenkins* (1) was a decision upon the statute 27 Eliz., and the object of it was to prevent a fraud.

Bramwell, L.J.

BRAMWELL, L.J.:—

I am of the same opinion.

*De Gex*, Q.C.:—I have before me the brief of counsel in *Ex parte Doble* (2), and it appears from the copy of the proceedings in it that the bankrupt in that case was not a trader. Therefore sect. 91 did not apply to him.

Solicitors for Appellants: *Hacon & Turner*, agents for *Tyndall & Tyndall, Birmingham.*

Solicitors for Trustee in Bankruptcy: *Robinson, Preston, & Stow*, agents for *Rowlands & Bagnall, Birmingham.*

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C. A. 1878 FRY, J. *March* 19, 20, 22, 23, 25. C. A. 1879 *March* 3, 4.

## STEUART *v.* GLADSTONE.

[1875 S. 247.]

*Partnership—Power of Expulsion—Validity of Notice—Bona fides—Partnership Accounts—Goodwill—Evidence—Admissibility—Admissions to Third Party.*

BCD869. 4ChD474 598

The articles of partnership of a business carried on in *England* and in *India* provided that the partnership should continue until dissolved as therein mentioned. Clause 20 provided that as soon as possible after the 30th of April in each year a general account and rest should be taken by the partners of the "stock, moneys, debts, lands, buildings, factories, and other the estate and effects belonging, due, and owing to the partnership," and of the debts and liabilities of the partnership, and that a fair valuation should be made of all the particulars included in such accounts which might be susceptible of valuation, and that copies of such account, rest, and

(1) 5 Ch. D. 619. (2) 26 W. R. 407.

valuation should be sent to the partners who were resident abroad; and that, for determining the profit and loss of the concern, full statements of the partnership and of the accounts of each partner should be made out up to the 30th of April in each year, and copies sent to each partner. It was provided that any partner might retire at any time upon giving twelve months' notice, and that, if a majority of the partners should at any time desire that any of the partners should retire, and should give him six months' notice in writing to that effect, the partnership should, as regarded him, be dissolved at and from the time mentioned in the notice. There was also, in case of the death of any partner, a provision for the dissolution of the partnership as regarded him. It was further provided, that if any partner should die or cease to be a partner under any of the provisions of the articles, there should be placed to his credit, in lieu of his share of profits accruing since the 1st of May next preceding his death or ceasing to be a partner, a sum equal to a proportionate part of his share of one year's profit calculated upon the average profits of the three preceding years of the partnership, and that the surviving or continuing partners should pay to the representatives of the deceased partner, or to the party ceasing to be a partner, the sum which should appear at his credit after the same should have been adjusted under the provisions thereinbefore contained, in three equal annual instalments. There was a provision for the entire dissolution of the partnership at any time at the will of a majority of the partners, of whom the junior partner was to be one. And it was provided, that, if any partner should retire or be removed, or if the partnership should be wholly dissolved, and a partnership should be formed by any three of the partners (one of them being the senior partner) for the time being for the purpose of carrying on the same business, the partner retiring or being removed, or who should not become a partner in the new partnership, should not enter into any business of a similar nature at any place where the partnership might have establishments, and any partner committing a breach of this provision was to pay to the other partners £10,000 as liquidated damages. On the 30th of April, 1875, the other partners gave the Plaintiff notice in writing of their desire that he should retire from the partnership, which would be, as regarded him, dissolved at and from the 31st of October then next. The reason for giving this notice was that the other partners were dissatisfied with the conduct of the Plaintiff. After the giving of the notice the Plaintiff was treated as no longer a partner, and he was not allowed to assist in the taking of the accounts, which were taken after April, 1875. In the valuation of the assets of the partnership which was then made the goodwill of the business was not included.

The Plaintiff filed his bill against the other partners, praying a declaration that the partnership was not effectually dissolved, and that the Defendants were not entitled to exclude him from the partnership; or that, if the partnership had been effectually dissolved, it might be wound up by the Court, and the value of the Plaintiff's interest in the business and assets, including the goodwill, ascertained:—

*Held*, by *Fry*, J., that the Defendants were not entitled to exclude the Plaintiff without first giving him a full opportunity of explaining his conduct:

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but that, upon the evidence, the Defendants had given the Plaintiff this opportunity before the notice was served upon him:—

*Held*, also, by *Fry*, J., that the notice, being valid at the time when it was given, could not be afterwards rendered invalid by the fact that the accounts afterwards taken were not taken in accordance with the provisions of the articles: but that the Plaintiff ought to have been allowed to assist in the taking of the accounts after April, 1875, and that the goodwill of the business ought to have been included in the valuation of the property of the partnership, and that the Plaintiff was entitled to have the accounts taken and the valuation made by the Court.

The Plaintiff was not called as a witness in support of his case:—

*Held*, by *Fry*, J., that the Defendants were entitled to put in evidence letters written by the Plaintiff to a person not a party to the action, and containing admissions by the Plaintiff material to the questions in issue; but that the Plaintiff must have, if he desired it, an opportunity of explaining the letters.

On appeal from so much of the decree as declared that the goodwill ought to be included in the valuation of the property of the partnership:—

*Held*, that the goodwill ought not to be so included.

Statement.

THIS suit was commenced by bill filed in the Court of Chancery on the 30th of October, 1875, for the purpose of obtaining a declaration that a notice of expulsion from a partnership firm, consisting of the Plaintiff and the Defendants, given by the Defendants to the Plaintiff in April, 1875, was inoperative, and for consequential relief.

The business of the partnership was that of Indian commission merchants, trading, prior to the 8th of January, 1864, at *Liverpool* and at *Calcutta*, and, after the 8th of January, 1864, trading at those places, and also at *Manchester*, at *Rangoon*, and in *London*. The business was established in 1824; the Plaintiff was admitted a partner in 1852. For some years prior to the 8th of January, 1864, the partners were *Murray Gladstone* (who died in October, 1875), *William McAdam Steuart* (the Plaintiff), and *Samuel Steuart Gladstone* and *Robert Gladstone*, two of the Defendants. On the 8th of January, 1864, articles of partnership were entered into between *Murray Gladstone* of the first part, the Plaintiff of the second part, the Defendant *S. S. Gladstone* of the third part, the Defendant *Robert Gladstone* of the fourth part, and the Defendant *John Francis Ogilvy* of the fifth part. These articles contained a recital that it had been agreed by the parties thereto of the first four parts that they should continue to carry on the

business, and should admit *Ogilvy* as a partner therein as on and from the 1st of May, 1864, and that the partnership should thenceforth be carried on subject to the conditions and stipulations thereinafter contained. The articles contained (*inter alia*) the following clauses :—

1. The parties were to be and continue partners from and inclusive of the 1st day of May, 1864, until the partnership should be determined or dissolved in manner thereinafter mentioned, upon the terms and conditions thereinafter expressed.

5. The capital was to consist of the sum of £200,000 to be contributed by the partners in equal shares of £40,000 each, and the share of each partner who had not already in the concern a sum of £40,000 was to be made up to that amount by means of the accumulations of profits thereinafter provided for.

6. The capital was to be employed in the business of the concern, and no part thereof to be drawn out by any of the partners for the time being except as thereinafter mentioned.

8. Subject as therein mentioned each partner was to be allowed interest at the rate of £5 per cent. per annum upon the amount of capital which he should from time to time have in the concern.

9. The partners were to be entitled to the profits of the business in the following shares :—*Murray Gladstone*, 28 per cent.; *Steuart*, 24 per cent.; *S. S. Gladstone*, 20 per cent.; *R. Gladstone*, 12 per cent.; *Ogilvy*, 10 per cent. The remaining 6 per cent. was to be carried to an account entitled "The Lapsed Share Account," which was to be dealt with as the senior partner for the time being should from time to time direct.

10. No partner for the time being having less than £40,000 in the concern was to be entitled to draw out of his share of the profits, in addition to the interest upon his capital, during and in respect of any year of the partnership, or within six calendar months after the expiration thereof, any greater sum than £50 in respect of each share which he might for the time being hold in the profits of the concern, the whole of such profits being for that purpose considered as divisible into one hundred shares, and the surplus, after such sum so drawn out, was to accumulate in the concern until the capital of such partner should amount to £40,000 at the least.

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"20. As soon as possible after the 30th of April in each year of the partnership a full and general account and rest shall be made and taken by the partners for the time being of the stock, moneys, debts, lands, buildings, factories, and other the estate and effects belonging, due, and owing to the partnership, and of such debts, liabilities, and engagements as shall be due and owing from or by the partnership, and of all such matters and things as are usually comprehended in matters of account taken by persons engaged in concerns of a similar nature; and a fair valuation and appraisement shall be made of all the particulars included in such accounts which may be in their nature susceptible of valuation: and copies of such accounts, rest, valuation, and appraisement shall be regularly transmitted to the partners or partner for the time being resident in the other places of business of the partnership; and such account shall be made up to, but not inclusive of, the 1st of May in each year, and that period shall, for the purpose of calculating profits and for all other purposes, be the termination of each year of the partnership, and for determining the profit and loss of the concern fair and full statements of the partnership and of the accounts of each of the partners shall be made out in *Liverpool*, up to and inclusive of the 30th of April in each year, in which shall be included the accounts of the *Calcutta* house up to and inclusive of the 30th of April in the preceding year; and copies of the statement of the accounts of the house, including the accounts of each partner, both at *Liverpool* and in *India*, signed by the partners residing at each place, shall be sent by such partners, as soon as possible after the same shall be made out, to the partners at *Liverpool* and in *India* respectively; and, if any partner shall see reason to object to any such account, he shall be bound to state such objection in writing within two calendar months after he shall have received such account, and such objection shall be addressed to the house in *Liverpool*, and each of the partners for the time being, after he shall have so signed or approved of any such account, or shall have permitted two calendar months to elapse from the receipt thereof without stating any objection in manner aforesaid, shall be bound and concluded by every such account respectively; and the same shall not afterwards be called in question unless some

manifest error to the amount of £20 shall be discovered therein, and signified in writing to the other parties interested in such account during the lifetime of all of them.

"21. With all convenient speed after the settlement of the accounts, at the yearly time hereinbefore appointed for taking the same, all such sums as shall appear upon taking such accounts to be the net gains and profits arising from the said business from the commencement of the partnership, or from the time up to which the last previous account shall have been so settled, as the case may be, and also the interest which shall be due to each partner on his share of capital shall be carried over to the credit of such partner's account in the books of the *Liverpool* firm."

"25. None of the partners shall draw, accept, indorse, or negotiate any bill of exchange, promissory note, or other negotiable instrument, in the name of any or either of the firms under which the partnership may for the time being be carried on, for his own private use, or for any purpose other than the immediate use of the partnership, or shall suffer the partnership effects, or his share or interest therein, to be attached for any private engagement or debt.

"26. If any one or more of the partners for the time being in the partnership shall, directly or indirectly, be concerned in or have any trade, business, or adventure whatsoever, or hold shares in any joint stock company whatsoever, for his own separate use or distinct from the business of the partnership, without the consent in writing of the two senior partners for the time being, or shall employ any moneys, goods, or effects belonging to the partnership, or engage the credit thereof in any matter or thing, except upon the account and for the use and benefit of the partnership, or shall do or willingly suffer to be done any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the stock or property of the partnership may be seized, attached, or taken in execution, contrary to the provisions in this behalf hereinbefore respectively contained, or in case any one or more of the partners shall at any time during the partnership become bankrupt, insolvent, or assign over his or their effects for the benefit of his or their creditors, or do or suffer any act in consequence whereof his or their share or interest in the

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partnership effects may be seized or taken in execution, then and in any such case it shall be lawful for the others or other of the partners for the time being in the partnership, if they or he shall think proper, to dissolve the partnership so far as regards the partner or partners so offending.

"27. If any partner for the time being in the partnership shall at any time hereafter be desirous of retiring from the said partnership, and shall, twelve calendar months at the least previously to the time at which he shall be so desirous of retiring, give a notice of such his desire to his partners for the time being resident in *England*, then and in such case the partnership shall, as regards the partner giving such notice, be dissolved at and from the time in such notice mentioned.

"28. If a majority of the partners for the time being in the partnership shall at any time be desirous that any of the partners shall retire from the partnership, and shall, six calendar months at the least previously to the time at which they shall be desirous that such partner shall retire, give a notice in writing of such their desire to such partner, then and in such case the partnership shall, as regards the partner to whom such notice shall be given, be dissolved at and from the time in such notice mentioned.

"29. If any of the partners for the time being in the partnership shall die, or shall cease to be a partner or partners under any of the aforesaid provisions, it is hereby agreed that the partnership shall from time to time, as often as the case shall happen, immediately determine, so far only as respects the partner or partners so dying or ceasing to be a partner or partners as aforesaid, and any lapse of shares arising therefrom shall accrue to such of the partners as may for the time being continue in the partnership, in proportion to the shares held by them respectively immediately before the occurrence of such lapse, or in such other proportion as a majority of the partners for the time being shall determine.

"30. If any of the partners for the time being in the partnership shall die or cease to be a partner under any of the aforesaid provisions, there shall be placed to the credit of the account of such partner, in lieu of his share of all profits accruing since the 1st of May next preceding his death or ceasing to be a partner as aforesaid, and as cash, twelve months from the 1st of May next after

his death or ceasing to be a partner as aforesaid, a sum of money equal to a proportionate part of his share of one year's profit, calculated upon the average profits of the three preceeding years of the partnership, and such proportionate part shall be calculated upon or in respect of the number of days which shall have elapsed at the time of his death or ceasing to be a partner as aforesaid since the 1st of May then last.

"32. If any of the partners for the time being in the partnership shall die or cease to be a partner in the concern by any means whatsoever, the concern shall not be thereby or thereupon wholly dissolved, except so far as regards the party so dying or ceasing to be a partner as aforesaid, but the account between such partner or his representatives and the house shall be adjusted as follows: The surviving or continuing partners shall pay to the representatives of such deceased partner, or to the party who shall so cease to be a partner as aforesaid, the sum which shall appear at the credit of the party so dying or ceasing to be a partner as aforesaid, after the same shall have been adjusted under the provisions hereinbefore contained, by three equal instalments, one at the end of the first year, one at the end of the second year, and one at the end of the third year after such partner shall have died or ceased to be a partner as aforesaid, such sum bearing interest at the rate of £5 per cent. per annum, and in case, on taking the accounts hereinbefore directed, the balance shall appear to be against the partner so dying or ceasing to be a partner as aforesaid, the balance shall be forthwith paid by the personal representatives of such deceased partner or by the party so ceasing to be a partner as aforesaid (as the case may be) to the surviving or continuing partners.

"34. If at any time hereafter a majority of the partners for the time being in the partnership (of whom the junior partner for the time being shall be one) shall be desirous that the partnership shall be wholly dissolved and wound up, it shall be lawful for them by any writing under their hands to dissolve the same at such time as they shall think fit.

"37. If any partner or partners shall retire from the concern or be removed therefrom under the powers for that purpose hereinbefore contained, or if the partnership shall be wholly dissolved

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as aforesaid, and a partnership shall be formed by any three of the partners for the time being, one of such partners being the senior partner for the time being, for the purpose of carrying on the business intended to be carried on by the present firm, then the partner or partners so retiring or being removed, or who shall not become a partner or partners in such new partnership, shall not nor will enter into any trade or business of a similar nature to the trade or business of this partnership, at any place where the present partnership may have establishments, or solicit or seek to gain the support of any of the customers of the present partnership, and each partner undertakes and agrees that, in case he shall commit any breach of this present clause, he will pay to the other partners, to be divided between them in the same proportions as they are respectively entitled to share in the profits of this partnership, the sum of £10,000, and that sum shall be taken to be liquidated damages, and shall not be considered in the nature of a penalty."

By an agreement dated the 1st of March, 1871, the Defendant *G. F. Mewburn* was admitted as a partner in the business, for five years from the 1st of May, 1871, subject to the terms of the articles of the 8th of January, 1864, so far as the same should apply, and subject to some special terms which are immaterial for the purpose of this report. He brought no capital into the business, but it was agreed that he should be entitled to 12 per cent. of the net profits. At the same time the shares of *Murray Gladstone* and the Plaintiff respectively were reduced to 20 per cent., the shares of *R. Gladstone* and *Ogilvy* respectively were increased to 16 per cent., and it was agreed that no further percentage of profits should be carried to the "lapsed share account."

It was the practice of the partnership to take an annual account in each year as of the 30th of April in that year, but these accounts were taken only for the purpose of ascertaining the amount of profits divisible among the partners. In the valuation of the assets of the partnership the goodwill of the business was not included, and, as the Plaintiff alleged, the value placed upon some of the other assets was not founded on an actual valuation made in each year, but was a mere arbitrary value. In the year 1867

the Plaintiff's father died, and he thereupon became entitled to an estate, consisting of a house and land, at *West Wickham*, in *Kent*, subject to certain charges for the benefit of his sisters, and after this he expended a large sum of money in enlarging the house and otherwise improving the property. When the annual account of the partnership was taken up to the 30th of April, 1873, it appeared that the Plaintiff had drawn out more than the whole of his capital in the business. His partners were much annoyed at this, and from the 27th of May to the 18th of September, 1873, a long correspondence took place between them and him with reference to the state of his affairs, and particularly with reference to the manner in which he had expended a sum of £29,000 which he had withdrawn from the firm. It appeared from the Plaintiff's answers that between £4000 and £5000 of this sum had been lost by him in speculations on the *Stock Exchange*, and that a large part of the remainder had been expended upon the *West Wickham* property. The Plaintiff also gave his partners information as to his father's estate, and the charges created by his will in favour of his sisters, and he represented that if he were allowed to draw £2000 a year from the firm, and if the *West Wickham* property could be let for the rent which he expected to get, he would have, after payment of his yearly liabilities, a surplus income of £1255, upon which, as he said, "we can manage." He expressed great regret at the position in which he had placed himself, and appealed to his partners as an act of mercy not to expel him from the firm. Ultimately an offer was made to him by his partners, which was contained in a letter written to him by *Murray Gladstone* on the 18th of September, 1873, in the following terms:—

"Having fully considered the position of affairs as affecting yourself, and the explanatory statement you have furnished, we have come to the following conclusions, and decided to make you the proposals which we now do.

"1st. That in order to place matters in proper and regular form with reference to the articles of partnership between us, we give you notice, which we hereby do, and which you will please to accept accordingly, to retire from the partnership now existing between us on 30th April, 1874. Your interest in the firm to cease and determine on that date.

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"2nd. That we make you two alternative offers for the future as from 30th April, 1874.

"A. To become a partner again in the firm, taking your place between *John F. Ogilvy* and *Geo. F. Mewburn*, subject to the following further terms, viz.:—

"1st. That your share from 1st May, 1874, be 16 instead of 20%, the difference of 4% to be carried to a separate account to provide for losses.

"2nd. That your power to withdraw money from the firm for personal expenditure or otherwise on your private account be limited to £2000 yearly, until the capital at your credit with the firm amounts to £40,000, and that it be so limited unless the capital of £40,000 be maintained.

"It is further to be understood that you engage not to enter upon any transaction hereafter similar to those which have led to this communication being made to you, and that, in the event of any proceeding on your part similar to those referred to above, your interest in the firm shall at once and forthwith cease.

"3rd. That the existing articles be taken as the guide of a partnership so formed, and the provisions be settled in proper shape.

"B. That in the event of your declining the above proposals 1–3, the following alternative takes its place:—

"1st. Your interest to cease on 30th April next, and to be adjusted in conformity with par. 30 of the articles, *i.e.*, your account will be credited with 20 per cent. of the year's profit, calculated upon the average profits divided of the three preceding years of the partnership. Cash 1st May, 1875, thus terminating your interest in the year 1873–4, and in the profits and business of the co-partnery.

"And that, in lieu of all unadjusted and unrealized commission, earnings, goodwill, or otherwise, we agree to pay you the sum of £2000 yearly, 1st May, 1875, 1876–1879, or for five years, in addition to what may be due to you in the settlement of the accounts of the firm."

To this the Plaintiff replied by a letter dated the 19th of September, 1873, in which he said:—

"I have to thank you very much for the consideration you have

shewn me in all these unhappy affairs, and I need hardly add that I accept the first of the alternatives you submit to me, and I hope that the future may make good the position which I have lost through my folly.

"If I write but briefly just now, I hope you will not think me less sensible of all your kindness. I cannot put all I feel on paper, but I do appreciate most heartily the manner in which you have dealt with me in these wretched affairs."

No new partnership articles were executed to carry out this arrangement. In November, 1873, the Plaintiff went to *India*, and did not return to *England* until December, 1874. Soon after he had left *England* his partners discovered that he had, in or before July, 1873, borrowed a sum of £5000 from his brother, for which he had agreed to pay interest at the rate of 10 per cent. per annum. He had not disclosed this loan to his partners. He had represented to his brother that the money was to be deposited with the firm, but, in fact, if the money had passed through the hands of the firm at all, as to which the evidence was not clear, they had merely received and had handed it over to the Plaintiff. After this discovery was made the other partners wrote letters to the Plaintiff requesting an explanation of the state of his affairs, but he neglected to answer the letters.

On the 4th of March, 1874, the Defendants *S. S. Gladstone*, *R. Gladstone*, and *Ogilvy*, wrote a letter to *Murray Gladstone*, as the senior partner, in which they said: "We have reason to believe that our partner *William Steuart's* private affairs are in a very confused condition, and that, until they are thoroughly investigated and put upon a footing satisfactory to ourselves, it is impossible for us to go on with the proposed partnership from 30th April next." The letter went on to mention certain points on which special information was required, and added: "We mention these particular items, but require a full and complete account without reservation. Pending the receipt of such account, and to provide against the possibility of its being delayed or unsatisfactory in its disclosures, we beg that you will give *William Steuart* notice that our proposed partneship, so far as he is concerned, terminates within six months from 30th April next." On the 5th of March, 1874, *Murray Gladstone* wrote a letter to the Plaintiff in which he

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inclosed the letter of the 4th of March, and said: "I have received the inclosed addressed to myself, and I pass it on to you as embodying what is deemed necessary information, before the future engagements can be definitively settled. I do not know how you can reply in the full manner requisite, unless you are here on the spot to give attention to the questions. They involve a clear explanation of how you stand in every way, and I am sure I shall be very glad, and I think I can speak for the others when I say that they will be much gratified, to have all that clouds your future and the future to us made clear. The view which I had was to have new articles as from 30th April next, because the positions of the partners are changed, as you know, by what passed lately, and I thought we might make them simpler in many ways.

"The existing arrangements terminate on 30th April, and a new partnership was to begin 1st May. This notice would terminate arrangements after 1st May. And to complete the notice, I add, for form's sake, a notice from myself, which please accept, that your partnership with us will terminate within six months from 30th April next.

"I regret very much that there should be any occasion to pass on such a communication, but the instinct of self-preservation is strong."

The formal notice was as follows:—"In compliance with the above formal request, I do hereby give you notice for myself and partners that the proposed partnership so far as you are concerned will terminate, and your interest cease and determine within six months from the 30th April next ensuing." This notice was signed by *Murray Gladstone*, *S. S. Gladstone*, and *Ogilvy*. After this the Plaintiff still omitted to furnish the explanations required by his partners, though they continued pressing him to do so. In December, 1874, he returned to *England*, when the requests for explanations were renewed, but he declined to comply with them. His partners had also discovered that he had been drawing out on his private account sums considerably exceeding the £2000 a year which had been agreed upon in the arrangement of September, 1873. He in fact drew out on his private account from the 18th of September, 1873, to the 1st of October, 1875, about

£8000. Ultimately, as the Plaintiff did not comply with his partners' requests for explanations, they, on the 30th of April, 1875, served on him the following notice, dated the 28th of April, 1875:—"To *William McAdam Steuart.*—We the undersigned, *Murray Gladstone, S. S. Gladstone, R. Gladstone, J. F. Ogilvy*, and *G. F. Mewburn*, the majority for the time being of the partners in the partnership firms of *Ogilvy, Gillanders, & Co.*, and *Gillanders, Arbuthnot, & Co.*, do hereby give you notice that we are desirous that you shall retire from such partnership, and that such partnership will as regards you be dissolved at and from the 31st October next. You will understand from this notice that we do not intend to insist upon the notice already given to you bearing date the 4th of March last, which notice you will consider withdrawn."

This notice was signed by *Murray Gladstone* and by the Defendants. After this the Plaintiff was treated as a stranger to the partnership. The accounts were taken up to the 30th of April, but the Plaintiff was not allowed to assist in the taking of them. No valuation was made of the goodwill as an asset of the business. A copy of the account was sent to the Plaintiff in July, 1875, and it shewed that he was indebted to the firm. In September, 1875, the Plaintiff drew a bill for £1000 upon the firm, and accepted it in the name of the firm. The £1000 represented a sum which he considered to be due to him from the firm. On the 30th of October, 1875, the Plaintiff filed the bill in this suit, alleging that the notice of the 28th of April, 1875, was invalid, and charging that, if it was justified by the articles, it had been given in pursuance of a scheme devised by *Murray Gladstone* and the Defendants with the view of securing a benefit to themselves by his expulsion, and was therefore an inequitable abuse of the provisions of the articles.

The bill prayed a declaration that the partnership had not been and would not be effectually dissolved by any of the notices above stated, but was still subsisting; and that the Defendants were not entitled to exclude the Plaintiff from the partnership. The bill further prayed for an injunction, and for the appointment of a receiver and manager of the business; and that, if it should be held that the partnership had been effectually dissolved so far as

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related to the Plaintiff, the partnership affairs might be wound up, and the rights of the Plaintiff ascertained and declared under the direction of the Court, and in particular that it might be declared that the Plaintiff was entitled to have the value of his interest in the business, and the goodwill, property, and assets thereof ascertained in the ordinary way, and was not bound by any previous valuation or account.

The Defendants by their answer denied the charge of *mala fides*, and insisted that the notice of the 28th of April, 1875, was valid, and that the partnership had been duly dissolved as regarded the Plaintiff. They also insisted that the annual accounts of the partnership had been properly taken, and that the Plaintiff was bound by them, and in particular by the account of April 1875. But they said: "We are willing that for the purposes of the accounts of the partnership for the year ending the 30th April, 1875, a valuation shall be made of all the lands and other property, money and debts belonging, due, and owing to the partnership susceptible of valuation which by the articles of partnership ought to be included in the annual accounts of the partnership, the accounts in other respects to be taken in accordance with the principle always adopted in making out the accounts of the said partnership; but we submit and insist that no valuation ought to be made of the goodwill of the said business, either for the purposes of the said accounts, or for any other purpose."

The action came on for trial before Mr. Justice *Fry* on the 19th of March, 1878.

Argument.

*Cookson*, Q.C., and *Everitt*, for the Plaintiff:—

The notice of expulsion is inoperative. The old partnership was determined by the notice given in September, 1873, and a new partnership was constituted by the letters which then passed between the parties. The stipulations of the old articles were certainly then varied in some respects, and it cannot be taken that the expulsion clause was to be inserted in the new articles which were to be prepared. Such a penal clause cannot be implied in the absence of express stipulation.

Moreover, the clause must be taken to have become inoperative, because the partnership accounts have not been properly taken in

the mode prescribed by the articles: *Blisset* v. *Daniel* (1); *Jackson* v. *Sedgwick* (2). But, if the expulsion clause could be acted upon, it must be exercised in good faith, and the Plaintiff ought to have had a full opportunity of explaining his conduct before the notice of expulsion was given, *Blisset* v. *Daniel*; *Clarke* v. *Hart* (3); *Const* v. *Harris* (4). No proper opportunity of explanation was afforded to the Plaintiff. In making use of such a power the majority of the partners ought to exercise a discretion, and not to expel another partner for the sake of appropriating his share to themselves. The utmost good faith is required in such a case. Such a power is of a penal nature, and is always construed most strictly: *Smith* v. *Mules* (5).

At any rate, if the notice of expulsion was good, the account was not properly taken. In estimating the value of the Plaintiff's interest, the goodwill of the business ought to have been included in the valuation: *Hall* v. *Barrows* (6). The words of clause 20 shew that this is so. Moreover, the valuation has not been made fairly; merely arbitrary values have been set upon many of the assets. This is not according to the provisions of clause 20, and even if this mode of valuation had been in fact previously adopted, the provisions of the articles cannot thus be set aside: *Lindley* on Partnership (7). If the notice of expulsion is held to be good, the partnership accounts ought now to be taken by the Court, and a proper valuation of the assets ought to be made, including the goodwill.

No witnesses were called in support of the Plaintiff's case.

*Kay*, Q.C., *North*, Q.C., and *F. Thompson*, for the Defendants:—

The letters of September, 1873, by which the new partnership was constituted, shew clearly that the new articles were to contain the expulsion clause. The terms of the new partnership were to be the same as those of the old, except so far as those terms were varied by the letter of the 18th of September.

The terms of a partnership may be varied by the course of

(1) 10 Hare, 493. 18 Jur 122
(2) 1 Sw. 460.
(3) 6 H. L. C. 633.
(4) T. & R. 496.
(5) 9 Hare, 556.
(6) 4 D. J. & S. 150.
(7) 3rd Ed. vol. i. pp. 618 *et seq.*

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dealing of the partners: *Pettyt* v. *Janeson* (1); *Simmons* v. *Leonard* (2). The power of expulsion has not become inoperative. It is an absolute power to get rid of a partner without assigning any reason. The case is quite different from *Blisset* v. *Daniel* (3), because here the articles expressly provide that the partnership is to last only until it is determined as therein mentioned, one of the events being the giving of the notice of expulsion. Another distinction between the present case and *Blisset* v. *Daniel* is this: that there the expulsion took immediate effect, whereas here it does not take effect for six months, and the accounts to be taken are future accounts at the date of the notice. If they are afterwards taken improperly, that cannot invalidate the notice if it was valid when it was given. As a matter of fact, the evidence shews that the Plaintiff had ample opportunity of explaining his conduct before the notice of April, 1875, was given; it was not necessary to make any formal demand for an explanation before giving the notice; the Plaintiff had full information beforehand that he would be expelled unless he gave a satisfactory explanation. The observations of Lord *Eldon* in *Const* v. *Harris* (4) shew that the act of the majority of partners is the act of them all if there is *bona fides*.

As to the claim to have the goodwill included in the valuation, the words of clause 20 do not extend to the goodwill, and, if they do, the course of dealing has put a different construction upon them, and the partners are bound by the mode in which the accounts have always been taken: *Coventry* v. *Barclay* (5). The goodwill has never been included in the valuation, and it was never intended that it should be. What value could the expelled partner's share in the goodwill have?

[FRY, J.:—The whole goodwill of the business would have to be valued, and the expelled partner would have his share of that value.]

In *Hall* v. *Hall* (6) it was held that a retiring partner was not entitled to any allowance for his share of the goodwill, there being no express provision to that effect in the articles. In *Hall* v.

(1) 6 Madd. 146.
(2) 3 Hare, 581.
(3) 10 Hare, 493.
(4) T. & R. 525.
(5) 3 D. J. & S. 320.
(6) 20 Beav. 139.

*Barrows* (1) what was really directed was a valuation of the partner's share of the goodwill. The decision in *Vyse* v. *Foster* (2) is inconsistent with the notion that the Plaintiff is entitled to any share of the goodwill. The Plaintiff is bound by the accounts, which have been taken in the mode which has been always adopted during the existence of the partnership, and the bill ought to be dismissed altogether. At any rate, the charges of fraud have entirely failed, and in any event the bill ought to be dismissed with costs to that extent.

During the examination of the witnesses for the defence,

*North*, Q.C., proposed to use as evidence two letters written by the Plaintiff to a Mr. *Ryrie*, which he said contained material admissions by the Plaintiff relevant to the issues between the parties, and to call Mr. *Ryrie* to prove the receipt of the letters.

*Cookson*, Q.C., objected.

*North*, Q.C.:—These letters would not have been admissible under the old practice of the Court of Chancery, because they have not been pleaded. But in the Courts of Common Law they would have been admissible; the Plaintiff, if he had been put into the box, could have been cross-examined with reference to them. Since the *Judicature Act* the rules as to evidence are the same in all the Divisions of the High Court, and this evidence ought not to be shut out because the Plaintiff has not chosen to tender himself as a witness. Of course he will be entitled to give an explanation of the letters. The Plaintiff has already sent us copies of these letters, as being some of the documents in his possession relevant to the matters in issue.

*Cookson*, Q.C.:—No precedent is shewn for admitting such evidence. It certainly would not have been admissible in the Court of Chancery. The admission of such evidence would lead to great abuses. At any rate it can only be made the subject of cross-examination, and if the Plaintiff does not wish to come forward as a witness, what right have the Defendants to prevent him from conducting his case as he likes?

(1) 4 D. J. & S. 150. (2) Law Rep. 7 H. L. 318.

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FRY, J:—

Mr. *North* asks me to allow him to adduce evidence of the receipt by a Mr. *Ryrie*, who is not a party to the action, of two letters from the Plaintiff which, as he suggests, contain important admissions relevant to the matters at issue. It is said on the part of the Plaintiff that the letters have never been pleaded, and that therefore they are not admissible in evidence. It appears to me that this objection cannot be sustained. For the present purpose I assume that the letters contain relevant admissions, and I think that, as the Plaintiff has not been put forward as a witness, they are admissible. If the Plaintiff had been examined, and the Defendants' counsel had omitted to call his attention to these letters in cross-examination, so as to give him an opportunity for explanation, I should not admit them now. But, as the Defendants have had no opportunity of doing this, and I can allow the Plaintiff, if he desires it, to give an explanation, I think the letters ought to be admitted. No doubt, according to the practice of the old Court of Chancery, if these letters had not been pleaded they could not have been admitted in evidence, but the reason for that is obvious. Under that practice each party to the suit gave his evidence in ignorance of the evidence of the opposite party; each party went into his evidence in the dark, and it would have been very unjust to allow one side to adduce new evidence at the hearing. In the case of *Austin* v. *Chambers* (1), Lord *Cottenham* said: "I have had frequent occasion, in this house and elsewhere, to state that where I find evidence of an admission, and that admission is not put directly in issue in the pleadings, so that the party against whom it was intended to be used had no opportunity of meeting it by other evidence, it would be a most unjust thing to bind the interests of the party by an admission so proved, and it would be a way of giving facility for producing false evidence, and be very dangerous and injurious to the general interests of suitors." But those observations have no application to the present practice. If I were to reject these letters, the result would be that a Plaintiff might have made a most material admission, which, if put to him in cross-examination, would have concluded the whole case against him, and yet, if he was not called as a witness, it could never be

(1) 6 Cl. & F. 38.

put to him at all. In other words, the Defendant would be entirely at the mercy of the Plaintiff. I shall therefore admit the proposed evidence, and I shall allow the Plaintiff to be called to explain the letters if he wishes to do so.

Mr. *Ryrie* was then called to prove the receipt of the letters from the Plaintiff, and the letters were read.

Argument.

*Cookson*, in reply:—

[FRY, J.:—I will relieve you from the question whether the accounts tendered to the Plaintiff in July, 1875, are binding on him, and whether he is entitled to a share in the goodwill.]

*Wade* v. *Jenkins* (1) shews that goodwill ought to be included in the valuation of a partner's share on a dissolution of the partnership. The accounts having been throughout taken in a manner not justified by the articles, the notice of expulsion was invalid. The machinery provided by the articles had become dead, and there was nothing upon which the expulsion clause could operate.

[FRY, J.:—I think the letters of September, 1873, operated as a new start. The new articles would have contained a clause similar to clause 20 in the old articles. Can the omission to take the accounts properly in 1874 amount to an abandonment of the machinery provided by these new articles?]

The expulsion clause was not applicable to the new partnership; the provision of clause 30 as to the average profits of the previous three years would not have applied. But the notice of March, 1874, purported to be given under the old articles, and it swept away the new arrangement, which, indeed, was never acted upon, except by a notice which professes to put an end to it. *Blisset* v. *Daniel* (2) is in my favour, for, looking at the provisions of clause 37, the expulsion clause in the present case is a more penal one than the clause in *Blisset* v. *Daniel* was. *Clark* v. *Leach* (3) shews that where a partnership for a term is continued at its expiration, without express renewal, it will not be assumed that stipulations in the original articles are continued unless they are properly applicable

(1) 2 Giff. 509. (2) 10 Hare, 493. 18 Jur. 122.
(3) 1 D. J. & S. 409. 9 Jur. N.S. 616

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to the altered state of circumstances. It must be clearly shewn that the expulsion clause was intended to exist under the new partnership. The decision in *Blisset* v. *Daniel* (1) did not depend merely on fraud. The distinction taken that in the present case the accounts were in the future at the date of the notice, is not a sound one; the argument must be carried to this extent, that if no accounts had been taken the Court would create the machinery *ex post facto* for the purpose of enforcing a forfeiture. The Court will not assist a forfeiture. *Wood* v. *Woad* (2) is another authority to shew that before expulsion a partner ought to be heard in his defence.

[FRY, J.:—I am with you as to that.]

*Const* v. *Harris* (3) fully supports my argument.

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FRY, J.:—

The Plaintiff asks me to declare that the notice of expulsion dated the 28th of April, 1875, which was to take effect on the 31st of October, 1875, is inoperative, and for relief consequential upon that declaration. The case has been presented to me by his counsel upon three grounds. They have said, first, that the partnership agreement which was subsisting when that notice was given did not include amongst its terms any power to give a notice of expulsion; secondly, that the expulsion clause had become inoperative, if it had ever been in existence; and thirdly, that there was a want of good faith shewn by the Defendants towards the Plaintiff in not communicating to him their intention to exclude him, and giving him an opportunity of removing from their minds the impression which ultimately resulted in the giving of the notice. [His Lordship then referred to the articles of 1864, especially with reference to the determination of the partnership, and continued:—]

The clauses which deal with the determination of the partnership may be divided into two classes. One class relates to the determination of the partnership with regard to a particular partner, in which case it is provided that, except so far as he is

(1) 10 Hare, 493. (2) Law Rep. 9 Ex. 190.
(3) T. & R. 496.

concerned, the partnership shall be continued. The other class provides for the entire dissolution of the partnership. But it is to be observed that in a legal point of view there is, in each case, equally a dissolution of the original partnership, because, the partnership being one of five persons, when it is dissolved as regards one the original partnership is undoubtedly determined, although by the terms of the articles a fresh partnership arises amongst the non-excluded or continuing partners.

Now the course of proceeding under the partnership was this. They were to take an annual account as on the 30th of April in each year. But, so far as appears by the accounts which have been produced to me, they were taken only for the purpose of ascertaining the profits divisible amongst the partners. [After referring to the correspondence which took place in 1873, his Lordship continued:—]

In my judgment the Plaintiff distinctly represented to his partners, that, if they entered into an arrangement with him, under which he was to be allowed to draw a sum of £2000 per annum from the firm, he would, if his anticipations with regard to letting *West Wickham* were not disappointed, be in a position to maintain himself by an annual income of £1255, and to keep his family in that position of respectability which became a partner in an important firm like this. The statements made by the Plaintiff were accompanied, as one is not surprised to find, by expressions of poignant regret at the course which he had pursued. I am bound to say that he did what, I think, as an honest and honourable man he was bound to do, he confessed in very explicit terms the folly of the course which he had been pursuing, and he appealed to his partners, not as a matter of right, but as an act of mercy, not to exclude him from the firm; and it appears to me that he was met by them in a spirit of which he has no right whatever to complain. Certain it is that at the end of the correspondence which resulted in the arrangement which I am about to mention, he expressed his sense of gratitude for the manner in which he had been treated by them. [His Lordship then read the letter of the 18th of September, 1873, and continued:—]

In my opinion, as a matter of construction, the effect of the 2nd clause of the first alternative of that letter is to require the inser-

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tion in the 26th clause of the articles of partnership of words describing a repetition by the Plaintiff of acts similar to those of which he had been guilty, and for the commission of which he had expressed so much grief, as one of the contingencies which would give rise to a power of immediate expulsion.

Now, the first question which arises for my consideration is this, what was the nature of the partnership articles which ought to have been prepared in accordance with those letters? Were they or were they not to include the 28th clause, which has been called "the expulsion clause"? In the first place, it is to be observed that the firm is contemplated as a continuing firm, he is "to become a partner again in the firm." In the second place, "the existing articles are to be taken as the guide of a partnership so formed." When I inquire what the duration of the new partnership was to be, I must refer to the articles of 1864, and I find that these articles provided for a partnership which was to continue until it was dissolved in one of the five manners which I have already noticed, and I know not upon what principle I can exclude any one of those five methods of dissolution from the new articles which were to be drawn in pursuance of the letter of the 18th of September, 1873. It appears to me that the only safe principle upon which I could construe this letter would be to take the articles of 1864 and to inquire what terms of the letter are inconsistent with the terms of those articles, and, so far as there is nothing in them inconsistent with the letter, to re-introduce them into the new articles. Again, the letter itself treats the power of expulsion as in existence, because it gives a notice which at any rate must be equivalent to an assertion on the part of those who give it, that "according to our construction and view of the articles that clause is still in force." To that assumption on the part of the Defendants no objection is taken by the Plaintiff, and he accepts a proposal based upon the conclusion of the old partnership by force of that very article, which he now says ought to be treated as non-existent.

My conclusion, therefore, is that the new partnership which was constituted by the letters of the 18th and 19th of September, 1873, was to be determined on the same contingencies, with one addition, as those provided for by the articles of 1864—the addition

being the event of the Plaintiff's repeating the conduct which caused the letter of the 18th of September, 1873.

It is asserted in the bill that the notice of the 18th of September, 1873, was inoperative, but this was not argued at the bar.

[His Lordship then referred to the loan of £5000 from the Plaintiff's brother, and continued:—]

The Plaintiff was so far forgetful of his duty towards his fellow-partners, that, when called upon for an explanation of his circumstances, and while affecting to give them a full explanation, he suppressed all mention of this very onerous debt. He represented to his partners that, if he could receive £2000 a year from the firm, and if he could let his estate at *West Wickham* on certain terms, he should have a sum of £1255, upon which he and his family could manage to live, whereas in fact that £1255 was diminished by the very large amount of interest which he was paying for this loan of £5000. It seems to me that, bearing in mind the good faith which one partner is bound to observe towards another, this concealment was a gross dereliction of duty on the part of the Plaintiff.

There was, therefore, in my opinion, in March, 1874, that which justified the Defendants in asking very explicitly for an explanation of the Plaintiff's liability to his brother, and in asking further that he should give them a full and complete account, without any reservation, of all his private affairs.

It may well be that the notice of March, 1874, was not a valid notice; in my judgment it was not. But it must be borne in mind that it was tendered as a mere formal matter, as an indication of the desire of the Defendants to receive full explanation from their co-partner. Mr. *Murray Gladstone* says that it is sent for form's sake, but he presses the Plaintiff with the notice in order that he may explain and remove the impression which had caused the notice to be given. And so, throughout the subsequent correspondence, the two alternatives are put before the Plaintiff: explain, and the notice will be withdrawn; do not explain, and you will certainly have to retire. Now I am bound to look at the substance of the case, and I cannot but see that the letter of the 5th of March stated in detail the motives which were operating

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upon the minds of the Defendants in proposing to compel the Plaintiff to retire. I cannot but see that throughout the whole of the correspondence, they gave him the most ample opportunity for explanation. Unfortunately the Plaintiff, for reasons into which it is not necessary for me to inquire, did not explain. It cannot be said that he had not the most ample opportunities of being heard, and of making every appeal to the feelings of affection and family regard which subsisted between him and several of the other partners, who were nearly related to him, before the final step was taken. On the 30th of April, 1875, the Defendants, having been advised that the notice of March, 1874, could not be relied upon, gave the further notice to dissolve as on the 31st of October following. It is said, and said truly, that before the service of that notice there was no formal demand made on the Plaintiff to come in and shew cause why the notice should not be given; but, in my judgment, the notice of March, 1874, although admitted not to be good as a final and binding notice, was a perfectly good notice *nisi*, a perfectly good intimation to the Plaintiff that he might explain, and might say and do everything he could to remove the impression existing in the minds of the Defendants, but that, if that impression was not removed, the necessary steps would be taken to remove him from the firm. When, therefore, the Plaintiff's counsel urged that there was a want of good faith on the part of the Defendants, because the Plaintiff had not an opportunity of giving explanations, I think they urged that which the facts entirely fail to support. I hope that nothing will ever fall from me to lessen the obligation of that extreme good faith which ought to abound between partners. But, in my judgment, the circumstances which preceded the giving of the notice of the 28th of April, 1875, shew a compliance on the part of the Defendants with that obligation. I think they acted on an impression which the Plaintiff might, if he could, have removed. He did not choose to remove it, and they then gave the notice of the 28th of April as a final binding notice.

In the survey which I have made of the transactions down to September, 1875, I have in effect expressed my opinion on the question whether there was any want of good faith on the part of the Defendants in the giving of the notice of April, 1875. In

my judgment there was not, and on that ground it is impossible to hold that the Plaintiff can be restored to the firm.

He has by his bill charged that there was a scheme on the part of the Defendants to exclude him from the firm for their own benefit. It appears to me that there is no justification for that allegation, and, whatever else I may hold, I must mark my disapprobation of such a charge being made against the Defendants by dismissing with costs so much of the bill as contains that charge.

The next point which arises is whether the accounts which were made up as of the 30th of April, 1875, and which were furnished to the Plaintiff in July of that year, were such accounts as would bind a retiring partner, and in order to answer that inquiry I must look at the partnership articles. [His Lordship referred to clause 20 of the articles.]

Now, the first inquiry is, what is the nature of the accounts provided for by that clause; and in order to answer that I must consider what, according to the scope and objects of the partnership articles, would be required. In the first place, it is quite clear that the accounts so to be stated must shew the clear profits, the net profits, the net divisible profits of the year. About that there can be no doubt. Further, it appears to me that they must shew how the concern stands as regards its capital, that is to say, there must be not merely a balance-sheet for the purpose of shewing the net profits of the year, but there must be something to shew what the property and capital of the concern are, a valuation of everything which belongs to the concern. I think that is apparent from the words used. It is to be a valuation of "the stock, moneys, debts, lands, buildings, factories, and other the estate and effects belonging, due, and owing to the partnership." Those words, in my opinion, comprise everything which constitutes for the time being part of the capital of the concern, whether earned by the expenditure of the available capital of £200,000, provided in sums of £40,000 by each of the partners, or not, and whether necessary to appear for the purpose of ascertaining the profits or not: the words of the clause say that everything is to be taken into account. Does the scheme of the articles require this to be done? I find a series of clauses which say that the retiring or excluded or deceased partner is to have paid to him a

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sum of money which is obviously intended to represent his interest in the partnership property, and, if that be so, the reason of the case requires that the whole of the partnership property should be valued. The language, therefore, of the clause, the object of the clause, and the reason of the case requiring that everything should be valued, I am at a loss to see why everything should not be included in the valuation. It is urged nevertheless that the goodwill ought not to be included. Why? It is part of the "estate and effects of the partnership." It is, to use the language of clause 20, a matter "in its nature susceptible of valuation." It is a thing in which a partner going out of a partnership loses his interest. It is a thing which is taken from an expelled partner. It is a thing, therefore, for which it is reasonable that an expelled or a retiring partner should be paid. No doubt, by convention between the parties, it could be excluded, and, if the articles had said so, I should not have hesitated for a moment to follow them. But, in my judgment, they do not say anything of the sort. It is suggested that, because the profits are explicitly dealt with and are directed to be carried to the account of the partner, and because there is to be an account of his £40,000, if there is anything else the continuing partners are to take it without paying for it. That argument, as it appears to me, can only be maintained by leaving out of consideration the important clause which says that the whole of the estate and effects are to be valued, that is, as I read it, that the whole of the capital and income are to be apportioned to the several partners in respect of their several interests in the firm. In my opinion, therefore, the goodwill ought to have been valued for the purpose of ascertaining what was the interest to which the excluded partner was entitled. It clearly was not valued in the accounts made out for April, 1875, and therefore I hold that those accounts were not such as could bind the excluded partner. Furthermore, clause 20 requires that the valuation shall be taken by the partners, but, although the Plaintiff was at the time in *England*, and capable of concurring in the valuation, instead of his being invited, or, I think I might say allowed, to concur in the valuation, nothing of the sort was done. The whole thing was done behind his back, in his absence, and then the account was sent to him in order that he might approve or disapprove

of it. Further, it is to be borne in mind, to use again the language of clause 20, there is to be "a fair valuation and appraisement" of all the particulars included in the accounts. The answer of the Defendants admits in substance that no fair appraisement or valuation was made. They say they cannot tell whether the amount put down is more or less than the real value. I have no doubt therefore that the provisions of clause 20 have not been complied with so far as they say that the accounts are to shew what shall appear to the credit of the partner under the 32nd clause. I make this observation because the accounts which were actually furnished to the Plaintiff in July, 1875, express upon their face that they are taken for the purpose only, as I read it, of the ascertainment and distribution of the profits and losses. They do not appear to me to have been intended for any other purpose.

I ought to make one or two other observations before I pass from this part of the case. It is said that the question with regard to the goodwill has been determined by authority by which I am bound. One case put forward is *Hall* v. *Hall* (1), a decision of the late Master of the Rolls. I am bound to say that that case appears to me either not to apply to the present case, or to be inconsistent with *Hall* v. *Barrows* (2). I am not sure that I understand upon what principle that case was decided, but it appears to me that it is distinctly not this case. The only other authority referred to is *Vyse* v. *Foster* (3). But in that case the point with regard to goodwill was not raised; it was not suggested at the bar, and it was not dealt with in the judgment. How, therefore, that case can be a binding authority on me I am at a loss to understand.

Now, having come to this conclusion, there arises this further question: Has the expulsion clause become inoperative by reason of the accounts rendered in July not being in accordance with the requirements of clause 20? It is to be borne in mind that the notice of expulsion dated the 28th of April is proved to have been served on the Plaintiff on the 30th of April, and that the articles

(1) 20 Beav. 139.
(2) 4 D. J. & S. 150.
(3) Law Rep. 8 Ch. 309; Ibid. 7 H. L. 318.

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require that this general rest and account should be taken as soon as possible after the 30th of April. The accounts were therefore future accounts, and I have a difficulty in seeing how a notice, valid at the time when it was given, can be rendered inoperative by the subsequent blunder of the persons who gave it in taking accounts upon which the notice was to operate. It appears to me, as I have already said, that the account of the description required by clause 32 to be operated upon by the notice has never been taken at all; that the only account which has been taken is one of profits. But I think the arm of the Court is long enough to take the accounts, and that in the present case the mere fact of the Defendants' blunder is not material. It is said that *Blisset* v. *Daniel* (1) decides that, where articles of partnership contain a clause of expulsion, and where the accounts have not been taken in the manner contemplated by it, the machinery is gone, and, with the extinction of the machinery, the clause itself is extinguished. I need not say that if *Blisset* v. *Daniel* decided that, I should follow it implicitly, but it does not appear to me that it does so decide. In that case the expulsion clause gave the power of immediate expulsion. The accounts upon which it was to operate were past accounts, the machinery therefore was of a kind which must exist, if at all, when the notice was given. The Court held that, the machinery not existing at the time, the expulsion clause itself could not possibly be put in force—that there was a condition *sine qua non* to the giving of the notice which did not exist. Here it is impossible to say that the taking of the accounts was a *conditio sine qua non* to the giving of the notice, because the accounts themselves were subsequent to the giving of the notice; and further, this is apparent that, supposing the Defendants had proceeded in the most regular and proper manner under clauses 20 and 32, yet the performance of the condition might have been defeated by the Plaintiff's own refusal to join in taking the accounts. I hold, therefore, that the expulsion clause is not inoperative, although the accounts rendered in July, 1875, were not proper accounts.

There is one other observation which I ought to make. Even

(1) 10 Hare, 493. 18 Jur. 122

if I had not come to the conclusion to which I have come, for the reasons I have stated, I should have had great difficulty in declaring the Plaintiff to be still a partner, when I bear in mind what occurred in September, 1875. During the currency of the notice of April an act was done by the Plaintiff in violation of the partnership articles. He accepted, in the name of the firm, a bill drawn by himself for his own private purposes, and he might upon that day have been excluded from the partnership under the provisions of the 25th clause. It is quite true that his partners did not exclude him on that ground, because they relied upon the notice previously given; but I am bound to say that, if I had not thought that notice good on other grounds, I should have had to consider long and well before I could have made up my mind to declare it void in favour of a person who had meanwhile committed an act for which he might have been at once excluded from the partnership.

I shall dismiss with costs so much of the bill as seeks a declaration that the Plaintiff is a partner with the Defendants, and relief on that footing; then declare that by the letters of the 18th and 19th of September, 1873, a new partnership was constituted between the Plaintiff and the Defendants, and *Murray Gladstone*, upon the terms of the articles of the 8th of January, 1864, except so far as they are altered by the letter of the 18th of September, 1873; then declare that by the notice of the 28th of April, 1875, the partnership so constituted was validly dissolved, so far as relates to the Plaintiff, on the 31st of October, 1875; then declare that the Plaintiff was not bound by the accounts rendered to him on the 7th of July, 1875, and, the Defendants by their answer submitting to the taking of an account, take a general account as on the 30th of April, 1875, in accordance with clause 20 of the articles, without disturbing any settled accounts; then declare that, in taking the account, the goodwill of the partnership is to be included as one of the effects of the partnership in its nature susceptible of valuation. There must be an inquiry what was the amount of the Plaintiff's interest in the assets of the partnership as on the 30th of April, 1875, in accordance with clause 20 and the previous declaration, and what is the sum to which he is entitled in respect of profits (if any). An account must be taken

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of the sums (if any) paid to the Plaintiff as retiring partner under the notice. The further consideration will be adjourned, with liberty to apply. I shall give no costs of the action to either party down to and including the trial, except the costs I have already mentioned.

C. A.

The Defendants appealed from so much of the judgment as declared that in taking the account the goodwill of the partnership was to be included as one of the effects in its nature susceptible of valuation. The appeal came on to be heard on the 4th of March, 1879.

Argument.

*Kay*, Q.C., *North*, Q.C., and *F. Thompson*, for the Appellants:—

There are three different cases as to the rights of a partner on dissolution. 1. Where the articles contain no express provision, there the assets must be realized, and he will receive his share; 2. Where the articles say that the continuing partners are to take to the share of the retiring partner, but do not prescribe the mode of valuing it; and 3. Where the articles provide that the share shall be taken to at a price to be ascertained in manner provided by the articles, as in *Vyse* v. *Foster* (1). Here, by Article 32, the retiring partner is to be paid the sum standing to his credit in the books. The case is not at all like *Hall* v. *Barrows* (2), where there was no direction how the value of the share was to be ascertained. Here it is to be ascertained by reference to accounts in which, according to the ordinary course of business, the goodwill would not be included, and never was in fact included. It would never occur to persons in business that the direction in Article 20 to value all particulars susceptible of valuation, would include goodwill. In the early stages of a new business there would be no goodwill, and can it be supposed that it was intended that a varying sum should be introduced in each year. If the value was increased the difference between the value of one year and that of the preceding year would increase the profits, and the partners would be entitled to draw out their shares of such increase, though it was not represented by anything tangible. This is an improbable intention, and such a proceeding might lead to great incon-

(1) Law Rep. 8 Ch. 309; Ibid. 7 H. L. 318.

(2) 4 D. J. & S. 150.

venience. The goodwill is not in any fair sense susceptible of valuation, though if the partners had been in the habit of treating it as capable of valuation the difficulty of valuing it would have had to be got over.

Argument.

*Cookson*, Q.C., and *Everitt*, for the Plaintiff:—

We contend that though a usage of taking the accounts in a particular way for the purpose of ascertaining what profits were divisible may have grown up, that does not apply in the case of a dissolution: *Lindley* on Partnership (1). A provision as to the mode of taking accounts *primâ facie* applies only during the continuance of the partnership: *Wood* v. *Scoles* (2). The 20th clause is wide enough to embrace goodwill. The word "stock" was said in *Hall* v. *Barrows* (3) to be enough.

[JAMES, L.J.:—Here it is provided that you are to have what is standing to your credit in the books, and the accounts directed by the articles from which that sum is to be ascertained are only accounts for the purpose of ascertaining profits. Do you say that the goodwill was to be included for the purpose of ascertaining the amount of profits divisible?]

The accounts here are not stronger for the purpose of excluding goodwill than the provision in the articles in *Wade* v. *Jenkins* (4), which was held insufficient to do so.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

The appeal in this case is brought from the decision of Mr. Justice *Fry*, and the question we have to decide is whether, upon the true construction of the articles of partnership, what is called the goodwill of a commission merchant's business ought to be valued.

Now, before considering the actual words used in the articles, it may be as well to consider what is the so-called goodwill. The parties were commission merchants, carrying on business with the East, and it is not usual to talk of the goodwill of such a business. We all understand the goodwill of a public-house; it is the habit

(1) 3rd Ed. p. 864.
(2) Law Rep. 1 Ch. 369.
(3) 4 D. J. & S. 150.
(4) 2 Giff. 509.

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of customers to resort to the house to drink. That is intelligible. But I do not understand what the goodwill of a business of this kind can mean. There is no resorting of customers to it in the sense that there is to a public-house or shop. There may be, as was said to be the case here, a very old name, the use of which may be of some value, but practically it is difficult to understand what is meant by goodwill; and it is so difficult that in other cases Judges have differed as to what it means and what is comprised in it, and how it is to be sold, and I believe the result is without exception that it is never sold alone.

That being so, goodwill being a thing in its nature certainly not easily susceptible of valuation, if susceptible at all, we have to consider what these gentlemen did when they went into the partnership. First of all, although it appears by the articles of partnership to have been an old established business (for there is a recital that the parties thereto of the first four parts, or some of them, had for many years past carried on business in partnership with each other under the firm of *Ogilvy, Gillanders, & Co.* at *Liverpool*, and at *Calcutta* under the firm of *Gillanders, Arbuthnot, & Co.*, these not being the names of the then partners, so that it was an old concern carried on under the names of some former partners in it) we do not find any statement of anything being given for goodwill, nor do we find the goodwill of the business taken into account; but when we come to the 5th article we find that the capital of the partnership is treated as a money capital, and as a money capital only. Then, when we turn to the 20th article, on which the discussion has chiefly arisen, I think it plain that the object of the article is merely to point out the mode in which the annual profits are to be ascertained. [His Lordship read the 20th article]. That article comes to this, that you are to make out an annual balance-sheet, and in that balance-sheet you are to put on one side the assets of the partnership, and on the other side the liabilities of the partnership, and you are to ascertain your annual profits. When they have been ascertained, what is next to be done? That is pointed out in Article 21. [His Lordship read the 21st article]. The shares of profits and the interest on shares of capital being thus carried to the credit of the partners, might be drawn out by them, though they were not at

liberty to draw out any capital. Then there come provisions by which partners can be expelled from the partnership, or may retire, and then the 32nd clause provides that on the death of any partner, or on any partner's ceasing to be a partner, "The surviving or continuing partners shall pay to the representatives of such deceased partner, or to the party who shall so cease to be a partner as aforesaid, the sum which shall appear at the credit of the party so dying or ceasing to be a partner as aforesaid after the same shall have been adjusted under the provisions hereinbefore contained" (that refers to the provisions of Article 30, which I have not read, for ascertaining his share of profits for what I will call the broken part of the year) "by three equal instalments" at the times therein mentioned. It appears, then, that in order to decide what the partner going out of the partnership is to receive, you have merely to turn to the books and find what is the sum standing to his credit; you have to add to that his share of profits under Article 30 for the broken part of the year, and the amount he is to receive is thus ascertained.

Then is it a fair construction of these articles to assume that in taking the annual accounts of the profits of the concern the partners were going to put a value upon the goodwill, so as to allow each partner to take year by year out of the partnership the amount of his share of the increase in the value of the goodwill? That is really what it comes to. Now one cannot help feeling that no mercantile man ever dreamt of such a thing. The goodwill is not an available asset in the sense that you can draw upon it or that you can turn it into money or pay it out to the partners, and I should say with some confidence, not only relying upon my own experience, but having appealed to the Bar in this case, that no one ever saw such a thing in a merchant's accounts. It is entirely a novel idea. What they would value would be the things "ordinarily capable of valuation," which would not include any such thing as goodwill. It would not appear in the account of assets at all, and consequently in ascertaining the profits nothing would be put down for increase of goodwill if it did increase, and nothing would be deducted for decrease of the value of the goodwill if it decreased. The sum which would be put to the credit of each partner in his account would be entirely inde-

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pendent of it. Of course, if the words were clearly the other way these considerations would have no place, but as I read the words their natural meaning is in entire accordance with the view I take of the construction of the articles. The article says "which may be in their nature susceptible of valuation." Every thing is in some sense susceptible of valuation. There is no contingency which cannot in some sense be valued. As has been said in another case, the value of a thing is what it would bring if put up to auction: somebody may bid something for it. But that is not the meaning of the words "in their nature susceptible of valuation." Those words mean susceptible of valuation in the ordinary mode of valuation adopted by commission merchants and persons carrying on such a trade as this.

It appears to me, therefore, that when the words are fairly looked at they corroborate the view which I have taken of the meaning of the articles independently of a criticism of the words.

There is only one other observation I have to make. These gentlemen carried on this business for years, and made annual valuations for years, and in no single instance did they ever value the goodwill. They adopted the very plan which I should have thought *à priori* that they ought to have adopted, and their practice under the articles, even if not amounting to a new article, certainly shews that the mode in which the profits were to be ascertained in this business was the mode which I have mentioned, not calculating the value of the goodwill.

For these reasons it appears to me that the direction complained of should be struck out, and the appeal allowed.

James, L.J.

JAMES, L.J.:—

I am entirely of the same opinion. It appears to me, with all deference to the view taken by the learned Judge, that the construction of these articles is reasonably plain, looking at the position and the object of the parties and the words of the several articles.

The article upon which everything turns in this particular case is the 32nd article, which, in the case of the death or retirement of a partner, provides as follows: "The surviving or continuing partners shall pay to the representatives of such deceased partner, or to the party who shall so cease to be a partner as aforesaid, the

sum which shall appear at the credit of the party so dying or ceasing to be a partner as aforesaid after the same shall have been adjusted under the provisions hereinbefore contained by three equal instalments." How was that to be adjusted? "Under the provisions hereinbefore contained." Every year there was to be carried to the credit of each partner for the year ending the 30th of April his share of the profit of the year and the interest on the share of capital standing to his credit; and he was at liberty to draw out the sums so carried to his credit. Mr. *Cookson* was obliged to confess that it would not be consistent with the practice or consistent with reason that there should be carried to his account so as to enable him to draw out from it a share of the increased value of the goodwill as part of his profits during the year. If it could not be carried to his account for the purpose of being drawn out it could not be carried to his account for any other purpose, for the articles only provide for taking one account. Is it reasonable, and could anybody ever suppose that a changing thing like goodwill, the value of which would vary year by year according to the state of trade in the countries in which this firm was carrying on its business, and according to the reputation which the house had acquired or had lost for integrity, punctuality, solvency, and mercantile prudence, was to be valued from year to year, and that the partners were to say, "Our goodwill last year was worth £10,000, this year it is only worth £9000, then carry the £1000 to profit and loss"; or, "Last year our goodwill was only worth £10,000, this year it is worth £15,000, carry the £5000 to profit"? That seems to be somewhat a *reductio ad absurdum* with reference to bringing it into the accounts under this article. Let us then look at the words of the 20th clause: "As soon as possible after the 30th day of April in each year of the said partnership a full and general account and rest shall be made and taken by the partners for the time being of the stock, moneys, debts, lands, buildings, factories, and other the estate and effects belonging, due, and owing to this partnership, and of such debts and liabilities and engagements as shall be due and owing from or by the partnership." Those words "estate and effects" in some sense might include goodwill, but beyond all question their true meaning, having regard to all the rest of the paragraph, is the

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estate and effects which are available for the purpose of discharging the debts and liabilities. Those words are followed by other words shewing that things which had no immediate money value but were matters of valuation were to include only those matters which were usually taken in matters of the same kind, and which were in their nature susceptible of valuation. It appears to me that all those words point clearly and distinctly to an exclusion, if it were necessary to exclude such an intangible thing as the changing value of the goodwill from year to year, which, according to the argument of Mr. *Cookson*, ought to be included in that account. I think it ought not to have been taken into account. It never could have been made an item in the account taken for the purpose of ascertaining what was the sum to be carried to the credit of each partner which he was to be at liberty to draw out, and if not, it is by the very terms of the 32nd article excluded from the calculation of the amount to be paid to the outgoing partner.

Bramwell, L.J.

BRAMWELL, L.J. :—

I am of the same opinion. The question turns upon the construction of the 20th article, and the question is whether anything in the nature of goodwill ought to be comprehended in the accounts to be taken under it.

Now, in order to see whether it ought, I think one may very properly consider whether it was likely that these parties would contemplate that there was a goodwill belonging to the partnership as such. I can very well understand that there is a goodwill belonging to the partnership while it subsists, in this sense, that any one leaving it is leaving a good thing and a profitable thing which he would pay money to join, since an old-established firm with well-known names, having a connection, with debts owing to it, would be a better thing for a man to join, and consequently a worse thing for him to leave, than a new concern with no connection, no debts owing to it, and no name. In that sense I can very well understand that there might be a goodwill, but I doubt extremely whether, practically, there can be any goodwill to this partnership as such so that upon its dissolution it would sell for anything. What is there to be sold? The name could

be sold, but that would not preclude any of the old partners from carrying on business in their own names. If the debts were not sold with the goodwill, there would be nothing to preclude the partners from immediately calling upon all the debtors of the concern to pay at once sooner than they otherwise would, and other rights would exist on the part of the parties to the dissolved partnership of such a character that no one would give a shilling for the goodwill. Under those circumstances, one would think that in fact a purchaser of the goodwill would be buying nothing at all. If you were to suppose that the connection was bought by buying up the debts, what would be the consequence? Possibly half a million of money would have to be found by the purchasers, or at all events an enormous sum of money, so that practically you would not find a customer for such a thing. I think those observations are important for the purpose of shewing that it is not likely that the partners would contemplate that as a partnership they were possessed of a valuable goodwill which they could sell. If they did not think so, I think it is extremely unlikely that they would suppose that in the event of any man being expelled he should have a benefit which would not accrue to him supposing there were a voluntary dissolution by the whole firm.

With those considerations, I approach the construction of the 20th article. It seems to me manifest, I cannot help saying, with great respect to the Judge whose decision is under appeal, that whether we look at the object for which the account is stated, that is to say, a division of profits, or whether we look at the words, it was not intended that anything in the nature of goodwill should be taken into account. I have said before that there would be this incongruity in it, that the goodwill would last only so long as the partnership lasted, and when the partnership came to an end there would be an end of the goodwill. Consequently, if the parties drew out on the footing that there was a goodwill, they would find when they came to the end of the partnership that they had got none at all, and consequently there would have been a serious overdrawing. Then as regards the language of the clause. An account was to be taken of the "stock, moneys, debts, lands, buildings, factories, and other the estate and effects

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belonging, due, and owing to the partnership." Now I will not say that "effects" under no circumstances would include goodwill. I can conceive it might, but when I read that word in connection with the other words, and with the following words, and with the words "susceptible of valuation," and with the objects of the articles generally, it seems to me that it was not intended that the goodwill should be included in the accounts so taken.

Solicitors for Plaintiffs: *Harrison, Beal, & Harrison.*

Solicitors for Defendants: *Field, Roscoe, & Co.*, agents for *Bateson & Co., Liverpool.*

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C. A. 1879 *March* 5.

## *In re* HARDLEY'S TRUSTS.

*Practice—Trustee Relief Act—Chancery Funds (Amended) Orders*, 1874, *r.* 5—*Notice of Payment into Court.*

Where the person mentioned in an affidavit on payment into Court under the *Trustee Relief Act* as being the person interested in the fund, could not be found, an opinion was intimated as to what would probably be held sufficient notice of the payment in, but the Court declined to give any directions.

Statement.

IN 1862 *John Hardley* made a mortgage in fee to *Thomas Howe Clarke* with a power of sale. In January, 1872, he died intestate. In May, 1876, Captain *Paley*, a transferee of the mortgage, sold the mortgaged property under the power of sale, and conveyed it to the purchaser, and after deducting the money due to him on his security there remained in his hands a balance of £1217, which ultimately, in November, 1878, he paid into Court under the Act for the relief of trustees.

By his affidavit made on the payment into Court, *Paley* deposed that he had made numerous inquiries with a view to ascertaining who was *John Hardley's* heir. The result of these inquiries was as follows: he had been informed by *Frederick Hardley*, a son of *John Hardley*, that *John Hardley's* eldest son, *Gillingham Hardley*, left this country for *Australia* in 1852, being a bachelor at that time; that his family received a letter from him shortly after his arrival there, but from that time till 1873 or 1874 no tidings or

communications were received of or from him by any member of his family; that in or about 1873 his family received intelligence of his being alive at a place called *Wincania* on the River *Darling*, in *Australia*, and that on writing to him at that place they received a letter from a person signing himself *Gillingham Hardley*, which they believed to have been written by *Gillingham Hardley;* that they had since written several letters to him and received replies from the same person, who at one time wrote from *Wentworth*, at another time from *Port Adelaide*, and lastly from *Port Augusta;* that his last letter was dated in or about December, 1876, and was received in *England* in March, 1877; that one of the letters sent to him mentioned the fact of the property having been sold, and that the surplus money was ready for him on his arrival in *England*, and that in letters received from him in reply he expressed his intention of returning shortly to *England*, but had never arrived, and since the receipt of his last letter no member of his family had heard of him; that the postmasters of *Port Adelaide* and *Port Augusta* had both been written to for information respecting him, and that a letter had been received from the Postmaster-General of *Port Adelaide* stating that inquiries had been made for him, but that no such person could be heard of.

The deponent went on to say that to the best of his belief *Gillingham Hardley* was the only person interested in the fund.

1879. Feb. 27. *Alexander*, for *Paley*, applied to Mr. Justice *Fry* for directions as to advertising notice of payment into Court. He referred to the cases mentioned below.

FRY, J., declined to give any directions or to express any opinion what would be considered sufficient notice.

1879. March 5. The application was now renewed before the Court of Appeal.

*Alexander*, for the application:—

Captain *Paley* is unable literally to comply with the requisitions of the Chancery Funds (Amended) Orders, 1874, rule 5, as to notice. He therefore asks for directions from the Court. *Re*

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*Hansford* (1), *In re Goodsman's Will* (before Vice-Chancellor *Malins*, June 3, 1870), and *In re Palmer* (before Vice-Chancellor *Malins*, May 9, 1873), are authorities for giving them.

[JESSEL, M.R. :—I believe that I have decided that it must be determined upon an application to distribute the fund, whether sufficient notices have been given, and that it was not a matter for *ex parte* application beforehand. What jurisdiction have we to direct substituted service ?]

The Court having seisin of the fund must have authority to tell the trustee what he ought to do.

Judgment, James, L.J.

JAMES, L.J. :—

If you write to the brother in *England*, and tell him of the payment into Court, and advertise in any newspapers in *Australia*, I think the Court will hereafter consider that you acted reasonably in incurring the expenses, and ought to be allowed them, and that you did all that it was incumbent on you to do. I can only say that is my opinion : we cannot, I think, give any directions which will free you from responsibility.

Jessel, M.R.

JESSEL, M.R. :—

I also am of opinion that we cannot give you any directions.

Bramwell, L.J.

BRAMWELL, L.J., concurred.

Solicitors: *Cunliffe, Beaumont, & Davenport.*

(1) 7 W. R. 199, 254.

(a) See 11 W.R. (1870) 152 (b) See 11 W.R. (1873) 101.

## *Ex parte* BALL. *In re* SHEPHERD.

C. A. 1879 Jan. 16, 23; March 6.

*Proof in Bankruptcy—Debt arising out of a Felony—Failure to prosecute Felon —Rights of Trustee in Bankruptcy of injured Person.*

*Per James* and *Bramwell*, L.JJ.:—Even if a person injured by a felony is debarred from proving in the bankruptcy of the felon in respect of the injury until he has prosecuted the felon, the obligation to prosecute does not extend to his trustee in bankruptcy, even though that bankruptcy occurred after a proof in respect of the injury had been tendered by the injured person himself. Under such circumstances the proof ought to be admitted in favour of the trustee.

Whether a voluntary assignee of the injured person would be relieved from the obligation, *quære*.

*Per Baggallay*, L.J.:—A person who has been injured by a felony is not allowed by the policy of the law to seek civil redress, if he has failed in his duty of bringing or endeavouring to bring the felon to justice.

But this rule does not apply where the offender has been brought to justice at the instance of some other person injured by a similar offence, or where prosecution is impossible by reason of the death of the offender, or where he has escaped from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence.

And the executors or administrators of the injured person, or his trustee in bankruptcy, can stand in no better position than he himself was in at the date of his death or of the commencement of his bankruptcy.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy (1).

*J. D. Shepherd* was a clerk in the employment of Messrs. *Willis & Co.*, bankers. On the 16th of March, 1877, he absconded, and it was then discovered that he had embezzled moneys belonging to his employers to a large amount, which was ultimately ascertained to be £7852 19*s*. On the 26th of March the bankers applied for a warrant for the apprehension of *Shepherd*, and the warrant was issued on the 28th of March. The officer who was intrusted with the warrant was, however, unable to find him, and, so far as could be ascertained, he had left *England* before the warrant was issued. On the 4th of May, 1877, *Shepherd* was adjudicated a bankrupt in his absence by the *Greenwich* County Court. On the 26th of March, 1878, *Willis & Co.* tendered a proof in the

(1) 9 Ch. D. 704.

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bankruptcy for the £7852 19*s*. On the 8th of May, 1878, the trustee in the bankruptcy rejected the proof. Meanwhile *Willis & Co.* had filed a liquidation petition, and Mr. *Turquand* had been appointed trustee of their property. He applied to the County Court for an order that *Shepherd's* trustee should admit the proof. The Registrar, acting as Deputy-Judge, affirmed the trustee's decision. *Turquand* appealed to the Chief Judge, who ordered the proof to be admitted, on the ground that it had not been shewn that *Willis & Co.* had not done their best to bring *Shepherd* to justice. The substance of the evidence upon which the Chief Judge came to this conclusion is given in the report of the hearing by him (1), and it is unnecessary now to repeat it.

Statement.

*Shepherd's* trustee appealed.

Argument.

*De Gex*, Q.C., and *H. F. Dickens* (*H. Winch* with them), for the Appellant:—

Embezzlement by a clerk is a felony: 24 & 25 Vict. c. 96, s. 68. A debt arising out of a felonious act cannot be made the subject of a civil action or of proof in bankruptcy until the injured person has prosecuted the felon: *Ex parte Elliott* (2); *Stone* v. *Marsh* (3); *Marsh* v. *Keating* (4); *Robson's* Bankruptcy (5). *Wells* v. *Abrahams* (6) has not altered the law. It is simply a decision that where it appears from the evidence at the trial that the cause of action arises out of a felony for which the Defendant has not been prosecuted, the Judge is bound to try the issues on the record, and ought not to nonsuit the Plaintiff. *Wellock* v. *Constantine* (7); *Prosser* v. *Rowe* (8); *Hayes* v. *Smith* (9) are in direct conflict with that case.

[JAMES, L.J.:—Can a man plead his own felony in answer to an action; and, if not, is his trustee in bankruptcy in any better position?]

*Ex parte Elliott* shews that the trustee can take the objection; and *Ex parte Jones* (10) and *Stone* v. *Marsh* are autho-

(1) 9 Ch. D. 706.
(2) 3 Mont. & A. 110.
(3) 6 B. & C. 551.
(4) 1 Bing. N. C. 198.
(5) 3rd Ed. 205, 206.
(6) Law Rep. 7 Q. B. 554.
(7) 2 H. & C. 146.
(8) 2 Car. & P. 421.
(9) Sm. & Bat. 378.
(10) 2 Mont. & A. 193.

rities to the same effect. *Markham* v. *Cobbe* (1); *Lutterell* v. *Reynell* (2); *Dawkes* v. *Coveneigh* (3); *Higgins* v. *Butcher* (4); *Cooper* v. *Witham* (5) are all authorities for the general proposition. *Lutterell* v. *Reynell* is the only case in which it was held that the felon could not plead the felony. But formerly it was thought that the civil remedy was merged; in more modern times it has been held that the civil remedy is only suspended until the felon has been prosecuted. If that be so, the felon in pleading the felony would not be taking advantage of his own wrong, and that destroys the *ratio decidendi* of *Lutterell* v. *Reynell*. The only exceptions from the rule are where prosecution has become impossible, as for instance, by the death of the felon, or where he has been prosecuted for a similar offence by some other person: *Stone* v. *Marsh* (6); *Crosby* v. *Leng* (7); *Wickham* v. *Gatrill* (8); *Ex parte Jones* (9); *Marsh* v. *Keating* (10); *White* v. *Spettigue* (11).

[BRAMWELL, L.J., referred to *Dudley and West Bromwich Banking Company* v. *Spittle* (12); *Addison* on Torts (13).

JAMES, L.J.:—If a plaintiff can prove his case without proving any illegality he can succeed; it is no answer for the defendant afterwards to prove an illegality: *In re South Wales Atlantic Steamship Company* (14).

*Beaumont, amicus curiæ,* referred to *Chowne* v. *Baylis* (15).]

Even if a man cannot plead his own felony, the Judge who tries the case is bound to lay down the law correctly: *Owen* v. *Hurd* (16). The rule that there must be a prosecution before a civil action can be brought has been established in the interest of the public. If the plea is put in, the Judge can stay the action until after prosecution.

[JAMES, L.J.:—Does the obligation to prosecute extend to any

(1) Noy, 82.
(2) 1 Mod. 282.
(3) Styles, 346.
(4) Yelv. 89.
(5) 1 Lev. 247.
(6) 6 B. & C. 551.
(7) 12 East, 409.
(8) 2 Sm. & Giff. 353.
(9) 2 Mont. & A. 193.
(10) 1 Bing. N. C. 198.
(11) 13 M. & W. 603.
(12) 1 J. & H. 14.
(13) 4th Ed. p. 31.
(14) 2 Ch. D. 763.
(15) 31 Beav. 351.
(16) 2 T. R. 643.

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Argument.

one but the injured person? Would it extend to his executors, and does it extend to his trustee in bankruptcy or liquidation?]

The representative must stand in the same position as the injured person himself; he must take the burden with the benefit. A trustee in bankruptcy or liquidation is the mere creature of statute, and can have no advantage which the bankrupt or debtor would not have had, unless it is expressly given to him by the statute. In this case *Willis & Co.* proved before they filed their liquidation petition.

[*Winslow*, Q.C., for the trustee of *Willis & Co.*:—They tendered the proof, but the application that it should be admitted was made by their trustee.]

At any rate, before he can bring an action, or sustain a proof in bankruptcy, the injured person is bound to shew that he has done all that lies in his power to bring the felon to justice: *Gimson* v. *Woodfull* (1). Here the effect of the evidence is that *Willis & Co.* did not use due diligence in endeavouring to prosecute the bankrupt; indeed it shews that they actually connived at his escape.

On the whole, the proof ought not to be admitted, and the Respondent ought not even to be allowed to enter a claim. The debt is not provable, and sect. 42 of the *Bankruptcy Act* does not apply.

At the conclusion of the argument for the Appellant,

THE COURT (*James*, *Baggallay*, and *Bramwell*, L.JJ.), said that they would consider whether they would call on the counsel for the Respondent.

In the result,

*Winslow*, Q.C., and *Bush Cooper*, for the Respondent, were not called upon.

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Judgment, Bramwell, L.J.

March 6. BRAMWELL, L.J.:—

In this case the debt which is sought to be proved arose from

(1) 2 Car. & P. 41.

the felonious act of the bankrupt in embezzling the moneys of his employers. The question is, whether, that being so, and no more having been done than has been done towards prosecuting the bankrupt, the trustee in the liquidation of Messrs. *Willis & Co.*, the employers, can prove for the debt in the bankruptcy. The law on this subject is in a remarkable state. For 300 years it has been said in various ways by Judges, many of the greatest eminence, without intimating a doubt, except in one instance, that there is some impediment to the maintenance of an action for a debt arising in this way. The doubt is that which was, not so much expressed by Mr. Justice *Blackburn* in *Wells* v. *Abrahams* (1) as to be inferred from what he said. But, though such an opinion has been entertained and expressed for all this time, there are but two cases in which it has operated to prevent the debt being enforced. These two cases are *Wellock* v. *Constantine* (2) and *Ex parte Elliott* (3). *Wellock* v. *Constantine* has been said to be no authority. If I may speak of myself, I have no doubt I concurred in the judgment, or the statement that I did so would have been set right, but I am sure I must have done so in the faintest way, not only from what I think now, but from what I am reported to have said then, and from there being no reasons given for the judgment, which I should have desired to give if I had thought there were any good ones to support it. But at all events there are the opinions of Chief Baron *Pollock* and Mr. Justice *Willes*—opinions which no one who knew those Judges will undervalue. Then there is the judgment in *Ex parte Elliott*, besides the expressed opinion for centuries that the felonious origin of a debt is in some way an impediment to its enforcement. But in what way? I can think of only four possible ways:—1. That no cause of action arises at all out of a felony; 2. That it does not arise till prosecution; 3. That it arises on the act, but is suspended till prosecution; 4. That there is neither defence to nor suspension of the claim by or at the instance of the felon debtor, but that the Court, of its own motion, or on the suggestion of the Crown, should stay proceedings till public justice is satisfied. It must be admitted that there are great difficulties in the way of each of these theories. That the first is

(1) Law Rep. 7 Q. B. 554. (2) 2 H. & C. 146.
(3) 3 Mont. & A. 110.

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Judgment, Bramwell, L J.

not true is shewn by *Marsh* v. *Keating* (1), where it was held that, prosecution being impossible, a felony gave rise to a recoverable debt. It is difficult to suppose that the second supposed solution of the problem is correct. That would be to make the cause of action the act of the felon, *plus* a prosecution. The cause of action would not arise till after both. Till then the *Statute of Limitations* would not run. In such a case as the present, or where the felon had died, it would be impossible. And it is to be observed that it is never suggested that the cause of action is the debt and the prosecution. The third possible way is attended by difficulties. The suspension of a cause of action is a thing nearly unknown to the law. It exists where a negotiable instrument is given for a debt and in cases of compositions with creditors, and these were not held till after much doubt and contest. There may be other instances. And what is to happen? Is the *Statute of Limitations* to run? Suppose the debtor or his representative sue the creditor, is his set-off suspended? Then how is the defence of impediment to be set up? By plea? That would be contrary to the rule, *nemo allegans suam turpitudinem est audiendus.* Besides, it would be absurd to suppose that the debtor himself ever would so plead and face the consequences. Then is the fourth solution right? Nobody ever heard of such a thing; nobody in any case or book ever suggested it till Mr. Justice *Blackburn* did as a possibility. Is it left to the Court to find it out on the pleadings? If it appears on the trial is the Judge to discharge the jury? How is the Crown to know of it? There are difficulties, then, in all the possible ways in which one can suppose this impediment to be set up to the prosecution of an action. But again, suppose it can be, what is the result? It has been held that when the felon is executed for another felony the claim may be maintained. What is to happen when he dies a natural death, when he goes beyond the jurisdiction, when there is a prosecution and an acquittal from collusion or carelessness by some prosecutor other than the party injured? All these cases create great difficulties to my mind in the application of this alleged law, and go a long way to justify Mr. Justice *Blackburn's* doubt. Still, after the continued expression of opinion and the cases of *Ex parte Elliott* (2) and *Wellock* v. *Con-*

(1) 1 Bing. N. C. 198. (2) 3 Mont. & A. 110.

*stantine* (1), I should hesitate to say that there is no practical law as alleged by the Respondent. It is not necessary for us to do so in this case, because, assuming that there is, and assuming that Messrs. *Willis & Co.* themselves could maintain no claim in this case until they had performed their duty (if it can be said there is any) to prosecute, we are of opinion that there is no such duty in the Respondent, who represents, not them, but their creditors; that the debt is due at and from the time of the act causing it; that the disability to sue or liability to have proceedings stayed, if any, is personal to him in whom is the duty, and, consequently, that this claim may be maintained. Whether that would be so if the assignment of the debt was purely voluntary and not under the *Bankruptcy Act*, I do not say. I may further add that I doubt much if Messrs. *Willis & Co.* themselves would not be entitled to prove, otherwise the estate of the bankrupt might be distributed and injustice done. If it should be said in answer to this that a claim could be entered, the claimant must be admitted to be heard, even before he can make a claim, and his claim would not prevent the distribution of the assets as they are got in among the creditors who have actually proved, unless some were set aside especially to provide for it, which would be a strange anomaly if the principle be a true one. In *Ex parte Elliott* (2) neither proof nor claim was admitted.

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JAMES, L.J.:—

James, L.J.

The judgment which Lord Justice *Bramwell* has just read expresses my opinion as well as his.

BAGGALLAY, L.J.:—

Baggallay, L.J.

I agree with my colleagues in thinking that the appeal in this case should be dismissed, but I prefer to rest my decision upon the same grounds as those assigned by the Chief Judge. It appears to me that the following propositions are affirmed by the authorities, many of which, however, are *dicta* or enunciations of principle rather than decisions:—1, that a felonious act may give rise to a maintainable action; 2, that the cause of action

(1) 2 H. & C. 146. (2) 3 Mont. & A. 110.

C. A. 1879 *Ex parte* BALL. *In re* SHEPHERD. Judgment, Baggallay, L.J.

arises upon the commission of the offence; 3, that, notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing or endeavouring to bring the felon to justice; 4, that this rule has no application to cases in which the offender has been brought to justice at the instance of some other person injured by a similar offence, as in *Marsh* v. *Keating* (1), or in which prosecution is impossible by reason of the death of the offender, or of his escape from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence; 5, that the remedy by proof in bankruptcy is subject to the same principles of public policy as those which affect the seeking of civil redress by action. It is unnecessary to refer to the authorities by which these propositions have been affirmed; the whole subject is fully discussed and the leading decisions commented upon in *Ex parte Elliott* (2), *Wellock* v. *Constantine* (3), and *Wells* v. *Abrahams* (4). I think, also, that neither the executors or administrators of the person injured by the felony, nor his trustee in bankruptcy, can be in any better position than he himself was in at the date of his death or of the commencement of his bankruptcy; and, if at such period prosecution of the offender had, by want of due diligence on his part, become impossible, and he had thereby been debarred from seeking civil redress, his estate must bear the consequences. The question then remains whether prosecution in the present case had been rendered impossible by reason of any want of due diligence on the part of Messrs. *Willis & Co.*; and upon this point I agree with the Chief Judge in thinking that there was no default on their part sufficient to have deprived them of a right to prove had they continued solvent.

The appeal was accordingly dismissed with costs.

*De Gex* asked for leave to appeal to the House of Lords.

*Winslow* opposed the application.

JAMES, L.J.:—

A grave question of principle is involved, and personally I

(1) 1 Bing. N. C. 198.
(2) 3 Mont. & A. 110.
(3) 2 H. & C. 146.
(4) Law Rep. 7 Q. B. 554.

should be very glad that the matter should be discussed in the House of Lords.

BRAMWELL, L.J., concurred.

Leave was accordingly given, on the terms of the petition of appeal being presented within a month.

JAMES, L.J.:—

I wish to say this—that, if it were necessary to decide the point, I should require to hear a great deal more to satisfy me that Messrs. *Willis & Co.* used due diligence in endeavouring to prosecute the bankrupt.

BRAMWELL, L.J.:—

I desire to add that I am not sure the law, if there is any on this subject, may not turn out to be this, that if the felon goes abroad and so a prosecution becomes impossible, that is the misfortune of the creditor, and he must wait till the felon comes back again.

Solicitors for Appellant: *Brook & Chapman.*
Solicitors for Respondent: *Lawrance, Plews, & Boyer*

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Jan. 17.

Considered. In re DEBTOR, No. 21 OF 1950 (No. 2) [1951] 1 Ch. 612

## PRINGLE *v.* GLOAG.

[1877 P. 192.]

*Practice—Costs—Debt—Award—Set-off—Solicitor's Lien—Common Law Rules as to Costs—Chancery Division—Additional Rules of Court (Costs)*, 1875, *rr.* 19, 28.

5 Q.B.D. 611.

By an arbitrator's award in an action the Plaintiff was ordered to pay a sum of money to the Defendant, and the Defendant was ordered to pay the Plaintiff a part of his costs when taxed:—

*Held*, that the Defendant was entitled to have the debt set off against the taxed costs, and that the right of set-off in such a case was not interfered with by the ordinary solicitor's lien for costs.

Rule 28 of Additional Rules of Court (Costs), 1875, when applied to the Chancery Division, does not mean that the old Common Law rules as to costs shall prevail in the Chancery as well as the other Divisions, but that the rules of the old Court of Chancery as to costs shall, except where altered by the new rules, remain in force in the Chancery Division.

Statement.

THIS was an action for dissolution of the partnership between the Plaintiff *Pringle* and the Defendant *Gloag*, and for accounts.

The matters in dispute having been referred to an arbitrator by an agreement in writing under the *Common Law Procedure Act*, 1854, he, by his award, dated the 17th of November, 1877, directed (amongst other things) that *Pringle* should within one month from the date of the award pay to *Gloag* a sum of £37 16*s.* 8*d.*, and that *Gloag* should pay to *Pringle* his costs of the action, and also one moiety of his, *Pringle's*, costs of the reference; *Gloag* was also to bear three-fourths of the costs of the award, and *Pringle* one-fourth.

The award was subsequently made a rule of the Chancery Division, and *Pringle's* costs payable by *Gloag* were fixed by the Taxing Master's certificate, dated the 9th of January, 1879, at £52 12*s.* 2*d.*

*Gloag*, claiming to set off the £37 16*s.* 8*d.* against the taxed costs, tendered *Pringle's* solicitor a sum of £14 15*s.* 6*d.*, the balance after allowing the set-off. This was refused by the latter, and he threatened to apply for a writ of execution for the total amount of the costs.

*Gloag* accordingly now moved for an injunction to restrain

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*Pringle* or his solicitor from issuing execution against him for the costs payable under the award without setting off the £37 16*s.* 8*d.*

It appeared that *Pringle* had absconded, and that any action against him for the £37 16*s.* 8*d.* would therefore be useless. His solicitor had not yet received any of the costs ordered to be paid by *Gloag*.

Argument.

*H. J. Hood*, for the motion:—

I submit I am clearly entitled to a set-off. Unquestionably, costs may be set off against costs; and if so, it is difficult to see why costs should not be set off against a debt. In fact, the authorities shew that such a right of set-off does exist: *Mercer* v. *Graves* (1); *Cooper* v. *Pitcher* (2); *Figes* v. *Adams* (3); *Thompson* v. *Parish* (4); *Mayne* on Damages (5); *Morgan* and *Davey* on Costs (6).

[*Whitehorne*:—*Ex parte Cleland* (7) is a distinct authority that costs cannot be set off against a debt.]

That case is commented upon somewhat unfavourably in *Mercer* v. *Graves*. Moreover, there the debt was already existing when the order for costs was made, whereas here the debt was created by the same order that directed payment of costs, and upon that fact I rely. It is in that respect that this case differs from the reported authorities. Upon principle this set-off should be allowed, for, as Mr. Justice *Willes* observed in *Thompson* v. *Parish*, it would be a great injustice if a party to an action who has been ordered to pay a sum of money should, when unable or unwilling to pay his creditor, still have power to compel the creditor to pay him a sum of money in respect of costs incurred in the course of the same proceedings.

*Whitehorne*, for *Pringle*:—

I submit the case is governed by rule 63 of *Regulæ Generales*, Hilary Term, 1853 (8), which says that "No set-off of damages or costs between parties shall be allowed to the prejudice of the

(1) Law Rep. 7 Q. B. 499.
(2) 4 Hare, 485.
(3) 4 Taunt. 632.
(4) 5 C. B. (N.S.) 685.
(5) 3rd Ed. p. 102.
(6) Pages 92, 127.
(7) Law Rep. 2 Ch. 808.
(8) Day's Com. Law Proc. Acts, Ed. 1861, p. 315.

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attorney's lien for costs in the particular suit against which the set-off is sought."

That was the practice at law prior to the *Judicature Act.* By rule 19 of Additional Rules of Court (Costs), 1875, the Taxing Master may set off costs against costs; and then rule 28 of the same Rules provides that "the rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs . . . and the taxation of costs existing prior to the commencement of the Act, shall, in so far as they are not inconsistent with the Act, and the Rules of Court in pursuance thereof, remain in force and be applicable to costs of the same or analogous proceedings . . ." Under that rule therefore the pre-existing right of a solicitor to his lien for costs must now prevail in this as in every other Division of the High Court.

[JESSEL, M.R.:—That rule surely does not mean that all the rules of the Common Law Courts which were sometimes in conflict with the rules of the Equity Courts, are now binding upon the Chancery Division. All it means is that all the old rules of the Court of Chancery, except so far as they are altered by the new rules, are still binding upon the Judges of the Chancery Division.]

This arbitration was under the *Common Law Procedure Act*, and was therefore really a Common Law proceeding; but the Common Law rules of set-off apply also in Equity.

The attorney's right of lien is a right attaching on the costs payable to his client; it is his only real security for his costs; the *jus tertii* given him by express provision cannot be taken away by an arbitrator's award, as is now suggested. In *Cowell* v. *Betteley* (1) an attorney's lien for costs was held to be paramount to the right of setting off damages against costs. As Chief Justice *Tindal* there said, the question is whether the *jus tertii* of the attorney is to be governed by the act of the arbitrator, contrary to the express provision of a rule of Court; in other words, whether the Court will put such a construction on the award as will defeat the rule of Court.

The fact that the debt is created by the same instrument that directs payment of costs makes no difference. The result of the

(1) 10 Bing. 432.

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award was that *A.* owed *B.* an ascertained amount, while *B.* owed *A.* an unascertained amount to be fixed by taxation in the future, and there cannot be a set-off of an ascertained against an unascertained amount. Costs may be set off against costs because both are unascertained. The foundation of the principle of set-off is that the two amounts must be owing in the same right; but costs are not, as in the case of a debt, the actual property of the party by whom they are recoverable: as Lord *Cairns* pointed out in *Ex parte Cleland* (1), they are paid to him, not for his own benefit, for he cannot take the money and spend it, but are paid to him subject to the lien of his solicitor, and are therefore held by him as trustee for his solicitor. That is the principle upon which *Ex parte Cleland* was decided. No doubt there was, in that case, an antecedent debt, but that does not affect the principle, which I ask your Lordship to apply to the present case.

Judgment.

JESSEL, M.R.:—

I think this set-off must be allowed. The facts are these. Two partners quarrel: one of them institutes an action for dissolution of the partnership and for accounts. The matter is referred to arbitration, and the arbitrator makes his award. He finds what amount is due from one partner to the other, what are the assets and who are to pay costs. He cannot say that a specific sum is to be paid for costs, because the costs are first to be taxed. He simply directs the payment of a sum of money by one party to the other, and orders the costs to be taxed and paid, and there he leaves it. The matter then goes before the Taxing Master. If *A.* is ordered to pay costs to *B.*, and *B.* is ordered to pay costs to *A.*, the rule is that the Taxing Master may allow a set-off of the one set of costs against the other. But here *A.* is ordered to pay a sum of money to *B.*, and *B.* is ordered to pay costs to *A.*, the result being that, on balancing the payments one against the other, there is a balance payable from *B.* to *A.* But *A.* absconds and cannot pay what he is ordered to pay to *B.*, and *B.* says, "Let there be a set-off of the one payment against the other and I will pay the balance which then remains due from me." I should have thought set-off in such a case was a matter of common sense—a matter of course.

(1) Law Rep. 2 Ch. 808, 813.

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But it is said that *B.* cannot claim set-off, because *A.'s* solicitor has a lien on the costs ordered to be paid by *B.* Now, what has a solicitor a lien for? For costs payable to his client: if not, he has no lien at all.

I see that even at Common Law the Judges have allowed a debt or damages in one action to be set off against costs in another action. In such a case there might possibly be some difficulty in allowing a set-off, but here it is merely a question of items of one account, and there can be no difficulty when a set-off is claimed in respect of items of account arising out of one transaction.

If Mr. *Whitehorne* is right on principle, then the General Order [Additional Rules of Court (Costs), 1875, r. 19] is wrong, because that order expressly provides that where a party is liable to pay and entitled to receive costs, these costs may be set off against one another, which is inconsistent with the idea that each solicitor necessarily has a lien on the amount coming to his client.

If £500 is due from *A.* to *B.*, and £400 from *B.* to *A.*, only £100 has to be paid by *A.*, but if Mr. *Whitehorne's* view is right, each of their solicitors has a lien for costs, and therefore each party may be liable to pay costs, notwithstanding that the Court may have ordered that the costs should be paid by one of them.

It appears to me that it would be a monstrous extension of the rights of a solicitor against the parties to an action to say that he should have the right to make the party who may have been successful in the ultimate result pay the losing party's costs; and unless I found an authority so deciding, I should decline to accede to any such proposition.

If a solicitor says, Unless I have a lien I cannot get paid, the answer is, he should see before he undertakes a particular business for a client, that that client is able to pay him for it: a solicitor is not compelled to work for an insolvent client.

I am clearly of opinion that this set-off must be allowed, and therefore there will be an order in the terms of the notice of motion. As I cannot make *Pringle's* solicitor pay the costs of this motion, there will be no order as to costs.

Solicitor for Plaintiff: *H. A. Lovett.*
Solicitors for Defendant: *Prideaux & Son.*

## MOOR *v.* ANGLO-ITALIAN BANK.

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Feb. 8.

[1879 M. 34.]

*Winding-up — Petition by Secured Creditor — Rules in Bankruptcy — Bankruptcy Act*, 1869, *s.* 6—*Judicature Act*, 1875, *s.* 10—*Mortgage on Property abroad—Proceedings in Foreign Tribunal—Injunction.*

The rules in bankruptcy contained in sect. 6 of the *Bankruptcy Act*, 1869, are not by sect. 10 of the *Judicature Act*, 1875, made applicable to the winding-up of companies.

There is no rule in bankruptcy that a petitioning creditor who omits in his petition either to give an estimate of the value of his security or to state that he will be ready to give up his security for the benefit of the creditors in the event of his debtor being adjudicated bankrupt, thereby forfeits the benefit of his security.

An incumbrancer on immovable property situate in a foreign country, who has instituted legal proceedings in that country for the purpose of enforcing his rights, will not be restrained by injunction from prosecuting such proceedings, even though the mortgagor is a company in course of winding up, at all events if the party seeking to restrain him may appear before the foreign tribunal and assert his rights.

Statement.

THIS was a motion on behalf of the Plaintiffs, the executors of *Henry Moor*, who was the holder of fifty-four debentures of the *Florence Land and Public Works Company, Limited*, in an action on behalf of themselves and all other holders of mortgage debentures issued by the said company against the *Anglo-Italian Bank, Limited*, and the said company as Defendants.

The mortgage debentures or obligations were issued in 1868. The articles of association of the company under which they were issued, and the form of the mortgage debentures, are set out in the case of *In re Florence Land and Public Works Company, Ex parte Moor* (1).

The Defendant bank alleged that the company was indebted to them in the sum of £83,711 for advances to the company, and that such debt was secured upon mortgage of certain lands and buildings belonging to the company at *Florence*, under or by virtue of a mortgage executed in the form required by Italian law, on the 3rd of March, 1871, and a subsequent deed dated the 28th of October, 1874.

On the 21st of July, 1877, the Defendant bank presented a

(1) *Ante*, p. 530. 532.

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petition for the winding-up of the company, alleging that the company was indebted to the bank in the sum of £83,711 and interest upon their security, but they did not, as the Plaintiffs alleged, estimate the value of the same security or offer to give up the same to be realized by the company or its liquidator. The Plaintiffs alleged that the Defendant bank in fact claimed to be creditors of the company for the whole amount of their debt and interest, and to prove for the same without making any deduction in respect of the security.

The company having been ordered to be wound up, the Plaintiffs took out a summons in the winding-up for a declaration that the said mortgage debentures were a charge on all the estate, property, and effects of the company: this came before Vice-Chancellor *Hall*, who, considering himself bound by the decision of the Master of the Rolls in *Norton* v. *Florence Land and Public Works Company* (1), decided that the mortgage debentures did not operate as a charge on the estate, property, and effects of the company.

From that order the present Plaintiffs appealed, and by an order of the Court of Appeal dated the 18th of December, 1878, the Court declared that the mortgage debentures were a charge upon the estate, property, and effects of the company comprised in the mortgage debentures; but the declaration was without prejudice to any question as to what estate, property, and effects were comprised in the mortgage debentures, and without prejudice to any question of priority as between the holders of such mortgage debentures and other mortgages, if any, of the company.

The Defendant bank having since taken legal proceedings in the Italian Courts to realize their security by means of a judicial sale of the property at *Florence*, which, as the Plaintiffs alleged, was the only property available for the payment of the creditors, the Plaintiffs brought their present action, claiming, among other things, a declaration that the Defendant bank was not entitled to a first or any other charge on the property comprised in their securities, and that they might be restrained by injunction from selling any of the company's property.

The Plaintiffs now moved that the Defendant bank might be

(1) 7 Ch. D. 332.

restrained from selling or disposing of the property and effects of the company, under and by virtue of the securities alleged to be held by them, or under or by virtue of any of the powers therein contained or thereby created, and also from receiving any moneys arising from the sale of any of the property of the company, by the order of any foreign Court or otherwise.

Statement.

The evidence of an Italian advocate was adduced to the effect that when the sale of the company's property took place under the order of the tribunal at *Florence*, the purchase-money would be under the custody of the Court, and would not be disposed of without notice to the other claimants.

It appeared that several months must elapse before the property could be sold and the proceeds distributed.

Argument.

*Roxburgh*, Q.C., and *Whitehorne*, for the Plaintiffs, in support of the motion:—

We submit that the sale of the company's property at *Florence* ought to be restrained, or, if it is carried out, that the debenture holders have a claim on the proceeds. The debenture holders had a prior charge on the property of the company, and the bank took their mortgage with notice of such charge.

The bank, by the course they have adopted, must be taken to have elected to give up their security and to go upon the general estate; if that is so, they have no right to sell the property except as trustees for the general creditors.

By sect. 10 of the *Judicature Act* of 1875 it is provided that "in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the cost of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." By sect. 6 of the *Bankruptcy Act*, 1869, it is provided that "the debt of the petitioning creditor must not be a secured debt unless the petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors in the event of the debtor being adjudicated a bankrupt, or unless the peti-

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tioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated."

Under this last section a man cannot get relief as a secured and as an unsecured creditor at the same time; he must either bring his security into hotchpot, or he must be held to have given up his security for the benefit of the general estate. The application of this principle is shewn in rule 99 of the Bankruptcy Rules, 1870, which provides that "a secured creditor, unless he shall have realized his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting the assessed value of his security."

In *Ex parte Ashworth* (1), a secured creditor, who had exercised his right of voting at a creditors' meeting without having stated the value of his security, was held to have parted with it for the benefit of the estate.

Applying this principle, according to the provisions of sect. 10 of the *Judicature Act*, to the case of a petitioning creditor, he is bound, according to the rule in bankruptcy, to give up his security for the benefit of the general estate, and then he can have no right whatever to sell under his security. A petitioning creditor in a winding-up is in a different position from all other creditors, for, applying the rules in bankruptcy so far as they are applicable, he must be taken to have proved his claim, because he has sworn that he is a creditor to a certain amount. He cannot afterwards, any more than a creditor who has proved in bankruptcy, be allowed to say he has not proved. If he proves as for an unsecured debt and at the same time holds his security, he cannot be allowed to realize his security.

In the case of *In re Printing and Numerical Registering Company* (2), your Lordship observed, with reference to sect. 10 of the *Judicature Act*, 1875: "As I read the section, the respective rights of the secured and unsecured creditors of a company in liquidation are the same as under the law of bankruptcy."

(1) Law Rep. 18 Eq. 705. (2) 8 Ch. D. 535.

The principle for which we contend was recognised in the case of *In re Balbirnie* (1), where the Chief Judge in Bankruptcy held that a secured creditor who proves his debt under a winding-up petition without deducting the value of his security, cannot, after a composition is effected, be allowed to set up his security. The question of the application of the rules in bankruptcy to winding-up petitions was also raised in *Campbell's Case* (2), and *In re Stockton Iron Furnace Company* (3).

Argument.

The relief we ask is similar to that granted in *Ex parte Tait* (4), where a creditor had sent in a claim in bankruptcy under a composition deed, and also brought an action in *Ireland* against the debtor, and the Chief Judge in bankruptcy held that he had power to restrain him from continuing his action. In the present case the bank, not having stated in their petition the value of their security, are in the position of unsecured creditors, and cannot take another step against the will of the other creditors in derogation of that position, to realize their security in a foreign country. We therefore ask the Court to restrain them until the hearing of the action from disposing of the property; at any rate, we ask that the proceeds of the sale may be secured for the other creditors.

*Davey*, Q.C., and *Stirling*, for the *Anglo-Italian Bank*.

*Ince*, Q.C., and *Crossley*, for the liquidator of the company.

JESSEL, M.R.:—

Judgment.

I do not want to hear you, Mr. *Davey*. This is an experiment, but it appears to me the more it is looked into the less ground there is for sanctioning such an experiment.

The object of the motion is to restrain the sale at the instance of the *Anglo-Italian Bank* by the Italian tribunal at *Florence*, of the property which is subject to the first mortgage made by the company, on the ground that the *Anglo-Italian Bank* is locally subject to the jurisdiction of this Court, and that the Plaintiffs have an equity to restrain such sale. It appears also that the

(1) 3 Ch. D. 488.
(2) 4 Ch. D. 470, 475.
(3) 10 Ch. D. 335.
(4) Law Rep. 13 Eq. 311.

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sale will not take place very rapidly, that it will be at least two or three months before it takes place, and that when it does take place the money will be brought into the foreign Court and will not be distributed without notice to all the claimants; and it is not suggested on the part of the applicants that any other mode of sale is possible when there is a mortgage, or mortgages, except a sale through the Italian tribunal; in other words, the mortgagee cannot in *Italy*, whatever he can do in this country, sell the property except through the tribunal. That is almost matter of common knowledge as regards continental law; but we have in this case the evidence of an advocate to that effect. That being so, the first question one naturally asks is, why should I interfere at all? If the Plaintiffs have any rights, those rights will be finally adjudicated upon at the trial of the action long before the money can be distributed. Besides that, the Plaintiffs could appear before the *Florence* tribunal and claim their share of the proceeds. It is not suggested that the Florentine tribunal does not know how to sell property subject to its jurisdiction.

But inasmuch as the case has been argued on the merits, and the merits, or so-called merits, raise some points of law upon which I have formed a very decided opinion, I see no reason for resting my decision merely on the ground that it is not a proper subject for an interlocutory application, because the cause will be heard, if it is ever heard at all, before the sale takes place, or rather before the proceeds are distributed.

The Plaintiffs say that as debenture holders of the company they have a charge on all the property of the company, and that their charge is prior in equity to the charge of the *Anglo-Italian Bank*. They say, secondly, that even supposing it is not prior in equity to the charge of the *Anglo-Italian Bank*, yet the *Anglo-Italian Bank* in *Italy* have, by virtue of certain proceedings taken in the liquidation of the company, and by certain provisions of the *Judicature Act*, forfeited or lost their security, and that forfeiture or loss of the security, as I understand it, enures in some mysterious way, which I do not understand, for the benefit of the Plaintiffs.

I will examine each of these points. First, as regards the charge of the Plaintiffs, that has been established by the decision

of the Appeal Court in the case of *In re Florence Land and Public Works Company, Ex parte Moor* (1), in which I myself took part. That established something more than that the Plaintiffs had a charge; it also established that the charge was subject to any mortgage made by the company carrying on their business before the debenture holders interfered to stop them, and therefore, in Equity, notice or no notice, the charge of the Defendants, the *Anglo-Italian Bank*, would be prior to that of the Plaintiffs. What I said in the Appeal Court, which of course is binding upon me here, is this, "I said 'some security.' Now, what kind of security?" Then I say: "You may arrive fairly at the conclusion that it means this kind of security—that the bond or debenture shall be a security on the property of the company as a going concern, subject to the powers of the directors to dispose of the property of the company while carrying on its business in the ordinary course. It is to be observed, as I said before, that the whole of the sub-sections in clause 88 are subordinate to the introductory words—that it is to be in the management of the affairs and business of the company. It is therefore inconsistent to suppose that the moment you executed a bond or debenture you paralysed the company and prevented it carrying on its business, for if you read the words to mean a specific charge on the property of the company, then, of course, no practical use could be made of the money borrowed, because that would become the property of the company, and anybody with notice would be liable on that view to repay it to the mortgagee or debenture holder. That would be one extravagant result. Another would be this, that if the company is formed to build and to let and mortgage its property, you can neither lease nor mortgage without the assent of every individual bond or debenture holder, which again, to my mind, would be extravagant. But if you read it as making a charge only to this extent, subject to the powers of the directors whilst they are carrying on the business, then, if they make default in payment of the principal or interest, a creditor can apply to a Court of Justice for a receiver and stop them from going on; but subject to that they carry on their business as usual, leaving the creditor to his remedy in case of default or in case of a total winding-up."

(1) *Ante*, p. 530.

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Lord Justice *James* took the same view. After saying that it is a charge on the undertaking, he goes on to say, "I am of opinion that the law does allow such a company as this to charge its undertaking, meaning by 'charging the undertaking' charging the assets for the time being." And then he goes on: "Of course that would leave them" (that is the company) "masters to deal with the property as long as the company remained a going concern, just as Lord Justice *Giffard* said in the case before him, the company being a company capable of buying property, selling it, disposing of it, and making specific mortgages upon it, that they were to go on doing that according to the constitution of the company, all which the persons lending money must have known. Reading it, as I do, as a charge upon the assets for the time being of the company, that would not in the slightest degree interfere with the company carrying on the business for which it was incorporated." So that the effect of the notice did not at all prevent the mortgage of the *Anglo-Italian Bank* being prior in point of security to the security of the Plaintiffs. That disposes of that part of the case.

That being so, I will examine the next part of the case. It was said that the 10th section of the *Judicature Act* of 1875 was to make all the rules of bankruptcy apply to a secured debt. Well, that is not quite so. When you come to look at the section, all it says is this, that "in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." Now, that only applies where the assets prove insufficient, that is, it does not apply to a winding-up generally, but to a winding-up in cases of insolvency; that is what it means.

The section provides that the same rules are to apply as to the respective rights of secured and unsecured creditors. What are the rules as regards secured and unsecured creditors which it is

alleged apply here? It appears to me the whole of the argument which has been addressed to me is founded on a mistaken reading of that section of the *Judicature Act*. What the Plaintiffs say is this: they say that a petitioning creditor in bankruptcy, in order to obtain adjudication, must be an unsecured creditor. That is quite correct in this sense, that he must be a creditor who either never had security, or, if he has one, has given it up or valued it, asserting it to be less in value than the debt, and who presents his petition as being well founded on the balance of the debt after setting off the value of the security, and that balance must amount to a certain sum. That is quite true in bankruptcy to obtain adjudication, but there are no such rules in winding up.

A secured creditor may present a petition for a winding-up—indeed you might not know at the time of the winding-up whether it is what is called a shareholders' liquidation, or a creditors' liquidation—whether, in fact, the company is solvent or insolvent. No such rules apply at all; but the winding-up is equally good whether it is obtained by a secured creditor or an unsecured creditor. The analogy fails, because in applying the rule of bankruptcy you must see that you can apply it to the winding-up, and there is no mode of applying this rule in bankruptcy to a winding-up. That would altogether dispose of the supposed analogy, but there is a little more in it than that when you come to examine it.

In the next place, I am not aware of any rule in bankruptcy that forfeits the petitioning creditors' debt. The rule in bankruptcy requires the judicial authority in bankruptcy—the Registrar or Judge, as the case may be—before he adjudicates a man a bankrupt, to see there is a proper unsecured debt in the manner I have explained. But if the adjudication is made without this being looked into, the only result is, the adjudication is bad, and you may set it aside in due time. It does not deprive the petitioning creditor of anything that I am aware of, and you must carefully distinguish between the notion of forfeiture and the decisions on the doctrine of election in bankruptcy which relate to a totally different subject. In bankruptcy, if a secured creditor wants to prove, he must do one of three things: he may give up his security altogether and prove for the full amount, or he may get his security valued and prove for the difference, or he may sell and

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realize his security and then prove for the difference. If, without doing either of the latter two things, he proves for the full amount, as he cannot prove for the full amount and receive a dividend except on the theory of giving up the security, he shews by that an intention to give up his security; and, if he so proves and receives a dividend or votes, he shews pretty conclusively that he has finally elected to give up his security and take his dividend; in other words, having two funds to resort to, the bankrupt's general estate, so as to get a dividend on the whole amount of his debt, or his security, he elects to take the bankrupt's estate, and in that way gives up his security. It is not forfeiture, it is election; but, the petitioning creditor gets nothing unless he proves. There is no obligation on the petitioning creditor to prove; he may make the man a bankrupt, and then he may be satisfied as far as he is concerned, and leave other creditors to prove; he does not elect simply by making a man a bankrupt. It is a new doctrine of forfeiture to be brought into bankrupt law if the petitioning creditor is to lose his security without getting anything out of the bankrupt's estate; it is no longer election, it is forfeiture, and forfeiture must be discovered in some Act of Parliament or section of an Act of Parliament, and there is no such section to be found. It appears to me therefore, as far as I know, that there is no such rule in bankruptcy, and therefore, even if the *Judicature Act* were to be read differently from the way in which I read it, the same result would follow under the bankruptcy law. Even if the *Anglo-Italian Bank* were to lose the benefit of their existing security, it would be for the benefit of the debenture holders, the second mortgagees, not for the general creditors.

I will now refer to the nature of the injunction asked. It is to restrain the Defendants, the mortgage creditors, from suing in the Court of the country where the immovable property is situate to obtain a decision in the Court of that country on the law relating to the disposition of that immovable property. *Primâ facie* this Court cannot interfere to restrain that proceeding. The Court of the country must be assumed to know more about the law of its own country than the Court of a foreign country, and the risk of miscarriage in this Court if it undertook to administer Italian law would be much greater than in the Courts of *Italy*, who are, of

course, more familiar with their own law; and as all parties can appear in that Court and have their rights finally settled, it appears to me it would be in the highest degree inconvenient for this Court to interfere at all, more especially when, to use an English phrase, the Italian Courts first had seisin of the matter, and have had seisin of it for some two or three years now past. On this ground also I should feel myself quite unable to accede to the present motion, which must be refused with costs.

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Solicitors for Plaintiffs: *Lewis, Munns, & Longden.*
Solicitor for *Anglo-Italian Bank: G. M. Clements.*
Solicitors for Liquidator: *Carr, Bannister, & Co.*

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## BRAMWELL *v.* LACY.

M. R. 1879 *Feb.* 24.

[1878 B. 634.]

*Lease—Lessor and Lessee—Restrictive Covenant—"Business"—Hospital—Injunction.*

A hospital, the patients of which make small payments according to their means, is a "business."

Covenant by lessee with lessor not to carry on upon the demised premises "any trade, business, or dealing whatsoever, or anything of the nature thereof, or suffer any act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience, of the neighbouring premises":—

*Held* to prohibit the user of the premises as a throat and chest hospital for poor persons, where small payments were made by the patients according to their means.

Statement.

BY a lease dated the 22nd of January, 1846, and made between *Richard Roy* of the one part, and *William Reynolds* of the other part, *Roy* demised to *Reynolds* a house, No. 3, *St. John's Gardens, Kensington Park*—a residential neighbourhood—for ninety-five years from the 29th of September, 1844, at a yearly rent; and *Reynolds* thereby covenanted with *Roy*, his executors, administrators, and assigns, as follows:—"That he the said *William Reynolds*, his executors, administrators, or assigns, shall not exercise or carry on or suffer to be exercised or carried on upon any part of the said premises any trade, business, or dealing whatso-

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ever, or anything of the nature thereof, without the consent in writing of the said *Richard Roy*, his executors, administrators, or assigns, or be party to or suffer any act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience, of the neighbouring premises."

*Roy* was also the landlord of the adjacent houses as well as of others in the neighbourhood.

The Plaintiffs subsequently purchased *Roy's* interest in No. 3, *St. John's Gardens*, and the other houses, and were now the owners thereof in fee simple subject, as to No. 3, *St. John's Gardens*, to the lease of 1846.

The Defendants were the committee of management of the *Hospital for Diseases of the Throat and Chest, Golden Square, Regent Street*, and had recently purchased the leasehold interest in No. 3, *St. John's Gardens*, for the purpose of establishing a branch hospital there for poor persons suffering from throat and chest diseases. The branch was established in May, 1878, since which period a considerable number of out-patients—but no in-patients—had been treated there, and supplied with medicines by the medical officer in attendance.

The branch was entirely free to the necessitous poor, and was supported mainly by voluntary contributions, but about half of the patients attending it made, in pursuance of the committee's regulations, small monthly payments according to their means.

The Defendants not having obtained the Plaintiffs' consent to the establishment of the branch hospital, the Plaintiffs issued a writ, and now moved for an injunction to restain the Defendants from using the house as a hospital or branch hospital for the reception or treatment of patients having diseases of the throat or any other diseases, and from in any manner committing a breach of the covenant contained in the lease of 1846.

By consent the motion was treated as the trial of the action.

From the evidence, which was on affidavit, it appeared that some of the patients attending the branch hospital had been suffering from diseases other than throat or chest diseases; and it was said that some of the diseases treated were of an infectious or contagious character. Several of the neighbours stated, amongst other grounds of complaint, that they experienced annoyance from

patients assembling in the street in front of the house, though this was denied on the part of the Defendants; that their property had, in their opinion, become depreciated in value on account of the proximity of the hospital; and that, moreover, the hospital was a source of danger to the health of the neighbourhood, and was and would be altogether a nuisance.

Argument.

*Davey*, Q.C., and *Hadley*, for the Plaintiffs:—

First, this is a "business," for some, at least, of the patients pay for medical advice. The word "business" does not necessarily mean a business carried on for profit: it may mean any "employment": *Johnson's* Dictionary, "Business."

Secondly, if this is not a "business," it is, at all events, something "which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience" of the neighbourhood; and we submit that annoyance and injury are established by the evidence.

*Chitty*, Q.C., *E. C. Willis*, and *G. Foster Cooke*, for the Defendants:—

The word "business" means the same thing as the words "trade" or "dealing," which are in collocation with it; that is, a business which is carried on for purposes of profit. It cannot, we submit, include, nor is it meant to include, an employment carried on for purely philanthropic purposes.

Then, upon the latter part of the covenant, the evidence is insufficient to establish a case of annoyance or injury. The assembling of patients in the street is denied, and if, in fact, it should ever happen, the ordinary police regulations would suffice to prevent any annoyance from that source. The alleged depreciation of property is, moreover, a matter of mere conjecture: no actual loss in marketable value is proved. So that the whole case resolves itself into nothing more than one of prejudice. To entitle the Plaintiffs to an injunction, it is not enough to say that the user of the premises as a hospital may by some possibility become a nuisance or cause damage to the neighbourhood: actual nuisance or damage must be proved. The covenant must have some reasonable restriction placed upon it, for it would be reducing it to an absurdity to make it include mere matters of personal antipathy. It cannot mean

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that any neighbour, who alleges that a particular thing which is being done is disagreeable or distasteful to him, is entitled to the benefit of the covenant: *Jones* v. *Thorne* (1); *Harrison* v. *Good* (2).

Upon every ground we submit that carrying on a hospital is not a breach of the covenant.

Judgment.

JESSEL, M.R.:—

The words of this covenant are peculiar, but I feel no doubt as to what they mean.

The covenant is as follows:—[His Lordship read it, and continued:—] The words "the neighbouring premises" must of course be held to mean "the owners or occupiers of the neighbouring premises."

Now the Defendants have converted this house—which is situated in a residential neighbourhood—into a hospital. It appears to have been already frequented by a considerable number of patients, who are treated and supplied with drugs by the medical officer in attendance, and it also appears that about one-half of the patients pay for their medical treatment. This payment is a very moderate one, and varies according to the means of the patient. There is no pretence for saying, nor is it alleged, that the hospital is carried on for a pecuniary profit, but very properly the hospital authorities require those patients to pay who can afford to do so. However, the neighbours complain of this hospital being established amongst them: they say it is a nuisance, and a source of danger to the health of the neighbourhood.

The Defendants say that the hospital is only intended for the treatment of throat and chest diseases; but it is well known that there are some throat diseases which are contagious; and, moreover, it is very possible that a patient on his first visit to the hospital might be found to be suffering from some disease of an infectious or contagious nature, and not from an ordinary throat or chest disease.

The Plaintiffs accordingly say that converting this house into a hospital, and receiving patients, is a breach of this covenant.

The first question is, is this a "business," or "in the nature of a

(1) 3 Dow. & Ry. 152. (2) Law Rep. 11 Eq. 338, 351.

business"? I have no doubt it is. It is in reality an apothecary's business. The question whether it is a business carried on for the purposes of profit or not, is not, in my opinion, material. Even if it is not strictly a "business," it is, at all events, "in the nature" of a business. But I am distinctly of opinion that this is a "business" within the terms and meaning of the covenant.

In the next place, is it or is it not an "act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience of the neighbouring premises"? The terms of the covenant are very comprehensive; they are the largest known to the law.

Now, upon this the Plaintiff's evidence is, to my mind, conclusive. [His Lordship then referred to the evidence, and continued:—] The evidence appears to me to be sufficient to shew that the persons in the neighbourhood have already suffered annoyance, inconvenience, and injury, and that the possible danger from infection is a matter of which they have a right to complain.

Upon these grounds, I am of opinion that the Defendants have committed a breach of the covenant, and the Plaintiffs are therefore entitled to an injunction, with costs; but the injunction is not to be enforced for two months.

Solicitors: *Bockett & Son; R. Chandler.*

V.-C. B. 1879 Jan. 29, 30, 31.

## SAFFRON WALDEN BUILDING SOCIETY *v.* RAYNER.

[1877 S. 161.]

*Mortgage—Priority—Notice to Trustee's Solicitors.*

A formal notice in writing of a charge upon a reversionary interest sent by the incumbrancers to the solicitors acting for the trustees, and by them verbally communicated to the trustees, is sufficient to fix the trustees with notice of the charge; and the incumbrancers do not lose their priority over subsequent incumbrancers from the fact that the trustees, when subsequently applied to by such subsequent incumbrancers proposing to make an advance upon the same security, answer that they are not aware of and have not received notice of any advance having been already made.

*Semble*, the notice to the solicitors would have been sufficient even if not communicated.

Statement.

FORECLOSURE ACTION.

*F. C. Hardy*, being owner in fee of a mill and other property in *Essex*, and also entitled under the will of his father *John Hardy*, who died in 1869, to a reversionary share, upon the death of his mother, in a sum of £5000, borrowed from the Plaintiffs in 1872 a sum of £550 on mortgage of his real property and reversionary interest.

Before advancing the money the Plaintiffs applied by letter to Messrs. *Stevens & Bawtree*, solicitors, of *Witham*, who had been employed by the testator in his lifetime and continued to act as the solicitors of the executors and trustees of the will—*Thomas Hardy*, *Joseph Cornell*, and Mrs. *Hardy*, the testator's widow—inquiring whether the trustees had notice or knowledge of any incumbrance on his share by *F. C. Hardy*. Messrs. *Stevens & Bawtree* replied on the 21st of March, 1872, inclosing an extract from the testator's will, and adding: "We are solicitors for the trustees of the late *John Hardy*. We have not had any notice, nor have any knowledge, of any incumbrance by Mr. *F. C. Hardy* of his interest under this will."

On the 13th of April the mortgage from *F. C. Hardy* to the Plaintiffs was executed, and on the 15th of April, 1872, the Plaintiffs gave formal notice in writing of this charge by *F. C. Hardy* on his reversionary interest under his father's will (directed to "the

executors and trustees of the above-named *John Hardy*") to *Stevens & Bawtree*, to whom the Plaintiffs at the same time sent a cheque for their charges "in relation to the extract of the will furnished by them, and acceptance on behalf of the trustees of the notice."

In 1873 and 1874 *F. C. Hardy* mortgaged his share to the Defendants *Rayner*, *Baker*, and the *London and County Bank*, without disclosing the mortgage of April, 1872, and, in fact, representing that he had not in any way charged or incumbered his share.

Upon the first of these transactions, in June, 1873, *Rayner*, the intending mortgagee, wrote to Messrs. *Cornell* and *Thomas Hardy*, asking if they had had notice or were aware of any incumbrance upon *F. C. Hardy's* share. The trustees both replied that they were not aware of any advance having been made to him on his reversionary share, and that they had not received any notice to that effect.

The mortgage to *Rayner* was executed on the 30th of June, and on the 10th of July, 1873, *Rayner*, by his solicitor, sent to each of the trustees notice in writing of such mortgage, and the receipt of such notice was duly acknowledged by them. Similar inquiries were made prior to the execution of the mortgages to *Baker* in December, 1873, and to the *London and County Bank* in October, 1874; and the trustees on both occasions answered that they were not aware of, and had not received notice of, any charge before that of June, 1873, to *Rayner*.

In April, 1876, *F. C. Hardy* filed a liquidation petition. The Defendants *Thomas Hardy* and *Cornell* having refused to admit the Plaintiffs' title as first incumbrancers on *F. C. Hardy's* reversionary share, on the ground that no notice of the charge of 1872 was received by them until 1876; and the Plaintiffs' claim to priority being also disputed by the incumbrancers of 1873 and 1874, the present foreclosure action was brought against the subsequent incumbrancers and the trustees in the first instance.

By their statement of defence the trustees refused to admit the claim of the Plaintiffs to be first incumbrancers in respect of *F. C. Hardy's* reversionary share, and denied that *Stevens & Bawtree* were the solicitors of them as trustees under the will of *John*

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*Hardy*. They denied that they, or either of them, had any personal or other knowledge of the notice of the Plaintiffs' mortgage alleged to have been forwarded to them through *Stevens & Bawtree*; and also denied that *Stevens & Bawtree* were authorized in any way by them (the trustees) to receive such notice on behalf of them.

The Plaintiffs had thereupon amended their statement of claim by adding Messrs. *Stevens & Bawtree* as Defendants, and claiming, if the Court should be of opinion that *Stevens & Bawtree* were authorized to receive notice on behalf of the trustees, or that the trustees had personally received notice, that the trustees should pay the Plaintiffs' costs of the action; but if the Court should hold that *Stevens & Bawtree* were not authorized to receive on behalf of the trustees such notice, then that *Stevens & Bawtree* might pay the damages caused to the Plaintiffs by their misrepresentation of authority, and also all the costs of the action.

At the hearing Messrs. *Stevens & Bawtree* produced the Plaintiffs' notice of the 13th of April, 1872, and gave evidence to the effect that at a meeting at their office on the 4th of June, 1872, of the trustees, *Thomas Hardy* and *Cornell*, and the testator's widow (who was an executrix), for the purpose of winding up certain litigation connected with the trust estate, Mr. *Stevens* in the course of this meeting sent his managing clerk (who confirmed Mr. *Stevens*' evidence) to bring from his strong room the notice of the 13th of April, 1872, and it was read out to them by the managing clerk; upon which (as stated by Mr. *Stevens* and the managing clerk) Mrs. *Hardy* said she was very sorry, and was afraid it was the beginning of evil days. No entry had been made in Mr. *Stevens*' books shewing that he had communicated the notice to the trustees, it not being, as he stated, a matter to charge for as against them; as he had been paid by the mortgagees' solicitors for sending the extract from the will, and for acceptance of the notice. The reason (as he stated) why he did not communicate the notice to the trustees and the widow before June, 1872, was that he was expecting the trustees almost daily at his office to settle up the matters connected with the suit already mentioned.

On the other hand, the trustees and the widow in their evidence denied, or had no recollection, that any notice of the Plaintiffs'

charge was given to them at the meeting of June, 1872; the first occasion on which they had heard of it being in May, 1876 (after the liquidation proceedings), when Mr. *Stevens* sent for the widow, and asked her several times if she did not recollect anything about the building society's mortgage (that of April, 1872), but the widow said that she had never heard of it, and knew nothing about it. Mr. *Stevens* said, "Try and recollect;" to which Mrs. *Hardy* answered, "She knew nothing about it, and so could not recollect."

Argument.

Sir *H. Jackson*, Q.C., and *Warmington*, for the Plaintiffs, the Building Society:—

The Plaintiffs, who are admittedly first incumbrancers in point of date, have proved that they gave formal notice of their charge to the proper persons to receive it, Messrs. *Stevens & Bawtree*, the solicitors of the trustees, and are therefore entitled to priority, whether *Stevens & Bawtree* did or did not communicate such notice to the trustees, as notice to the solicitor of the trustees of a reversionary interest is notice to the trustees themselves so as to bind the interest: *Rickards* v. *Gledstanes* (1); *Boursot* v. *Savage* (2). It is no excuse for a trustee who has received notice to say that he did not, when subsequently asked, recollect the fact; and he is liable to make good any loss occasioned by his misrepresentation, however innocent, and though arising from want of memory: *Burrowes* v. *Lock* (3); *Slim* v. *Croucher* (4). Then it is alleged that *Stevens & Bawtree* were not the solicitors of the trustees for the purposes of notice, and in fact misrepresented to the Plaintiffs their authority. If that be so the Plaintiffs are entitled to relief against them in damages for such misrepresentation, so far as it may have the effect of postponing the Plaintiffs to subsequent incumbrancers who gave notice to the trustees; *Spedding* v. *Nevell* (5); *Godwin* v. *Francis* (6); *Richardson* v. *Williamson* (7).

*Kekewich*, Q.C., and *Byrne*, for the Defendants *Rayner*, *Baker*,

(1) 3 Giff. 298. 8 Jur. N.S. 455.
(2) Law Rep. 2 Eq. 134.
(3) 10 Ves. 470.
(4) 1 D. F. & J. 518; 2 Giff. 37. 6 Jur. N.S. 140, 457
(5) Law Rep. 4 C. P. 212.
(6) Ibid. 5 C. P. 295.
(7) Law Rep. 6 Q. B. 276.

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Argument.

and the *London and County Bank*, incumbrancers subsequent in date to the Plaintiffs:—

These Defendants, who have given formal notice of their charges to the trustees themselves, and were informed by the trustees that they knew of no incumbrance upon the interest, are entitled in priority to the Plaintiffs, who gave notice to Messrs. *Stevens & Bawtree* only. Notice to a solicitor, which is not formally communicated to his clients, is not of itself sufficient to affect the clients with notice, there being no case in which it has been held that a solicitor acting for trustees on a general retainer is their agent for the purposes of notice: *Re Durand's Trusts* (1); so that his knowledge is to affect them, although actual notice is not brought home to them. *Rickards* v. *Gledstanes* (2) is no authority for the Plaintiffs' contention that notice to a solicitor is notice to his client for all purposes, as the question there was not between first and second mortgagees, but whether the notice was sufficient to take the fund out of the order and disposition of the mortgagor; and *Boursot* v. *Savage* (3) turned upon whether a purchaser was fixed with constructive notice of a trust through the knowledge of his solicitor. What is the nature of the notice required in order to fix the trustees? Mere casual conversation will not do: *Re Tichener* (4). The solicitor should have forwarded or formally communicated to his clients in writing the notice which he had received; and at any rate it must be shewn "that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man or an ordinary man of business would act upon the information, and would regulate his conduct by it in the execution of the trust": *Lloyd* v. *Banks* (5). Applying this test, the evidence of notice falls far short of that which is absolutely necessary to affect the trustees with knowledge. Even assuming that the statements of Mr. *Stevens* and his managing clerk are correct in every particular, it is plain that the fact of the incumbrance of April, 1872, was not brought home to the minds of the trustees, as they had no recollection whatever

(1) 8 W. R. 33.
(2) 3 Giff. 298.
(3) Law Rep. 2 Eq. 134.
(4) 35 Beav. 317.
(5) Law Rep. 3 Ch. 488, 490.

only one year afterwards of such information having been given to them.

*Swanston*, Q.C., and *Everitt*, for the trustees:—

The Court is now asked for the first time to hold broadly that notice to a solicitor of an assignment of a *chose in action* is notice to the client. Messrs. *Stevens & Bawtree* were not at the time solicitors for the trustees. The business for which they had been retained was at an end, and in any case it was no part of their duty to receive on behalf of the trustees, or to communicate to them this notice. They were the agents for the assignees of the *chose in action*, the Plaintiffs, by whom they were paid, and not for the trustees. The Plaintiffs have entirely failed to shew that notice of their charge was given to the trustees under such circumstances as made them responsible to the incumbrancers, for whom they would thereupon become trustees. It was not enough to give notice to the solicitors; and the Plaintiffs have not proved satisfactorily that such notice was communicated to the trustees, so as to fix them with knowledge according to the requirements of *Lloyd* v. *Banks* (1). For this purpose constructive notice will not do. The letters and conduct of the trustees, who distinctly denied all knowledge of any prior charge, when applied to in June, 1873, at a time when they had no motive for concealment or falsehood, are all perfectly consistent with their present clear, distinct, and unequivocal statement, and inconsistent with the evidence given by *Stevens* and his managing clerk. We submit that no case whatever has been shewn for giving the Plaintiffs priority.

*Hemming*, Q.C., and *Bush*, for *Stevens & Bawtree*:—

The distinct aud positive statement of Mr. *Stevens*, confirmed by the evidence of his managing clerk, of what took place at the meeting of May, 1872, must outweigh the denial, from want of recollection, on the part of the trustees and Mrs. *Hardy*. Messrs. *Stevens & Bawtree*, beyond doubt, did their duty as solicitors in taking the first opportunity, when they had the trustees and Mrs. *Hardy* together, of reading them the notice which they had received from the Plaintiffs. The absence of any entry in their

(1) Law Rep. 3 Ch. 488, 490.

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books shewing that the notice had been communicated to the trustees on that occasion was accounted for by the fact that it was not a matter for which a charge could be made against the trustees. As to sending for Mrs. *Hardy*, and not the trustees, in June, 1876, what need to send for the trustees when notice had been given to them in May, 1872; and further, Mrs. *Hardy* was mother of *F. C. Hardy*, and had already lent him money. No sufficient case, therefore, has been shewn for affecting Messrs. *Stevens & Bawtree* with any liability in the matter.

Sir *H. Jackson*, in reply:—

There may be some hardship upon the Defendants, who advanced their money on the faith of a statement that there was no prior incumbrance on the property; but the hardship will be still greater if the Plaintiffs—purely innocent parties, who did all they were bound to do by giving formally sufficient notice of their charge to the proper persons to receive such notice (Messrs. *Stevens & Bawtree*, who are proved to have been the solicitors acting for the trustees in the matter)—are deprived of their priority. Actual notice to the solicitor of the trustees is actual notice to all the trustees: *Rolland* v. *Hart* (1); *Dart's* Vendors and Purchasers (2); and it is not necessary that formal notice should have been given to the trustees, it being sufficient if it be shewn that the fact of the assignment was communicated to them: *Tibbits* v. *George* (3).

*Kekewich*, Q.C., and *Swanston*, Q.C., were heard in reply upon *Tibbits* v. *George* and *Rolland* v. *Hart*.

Judgment.

BACON, V.C.:—

The only real difficulty in the case is occasioned by the positive conflict of evidence to which I have been compelled to listen, and which I have heard with no great amount of satisfaction. The Plaintiffs' case is an extremely plain and simple one, namely, that an application being made by Mr. *Frederick Hardy* for a loan of money, and a security being offered in the shape of certain real estate and his interest in a legacy of £5000 under his father's

(1) Law Rep. 6 Ch. 678. (2) 5th Ed. p. 858.
(3) 5 A. & E. 107.

will, the Plaintiffs set about making the necessary inquiries, and inquired of Messrs. *Stevens & Bawtree*, first, whether they were the solicitors for the trustees, and, secondly, whether there was any incumbrance on *Frederick Hardy's* share. The answer given to them is distinct and explicit. We are solicitors for the trustees, and we know of no incumbrance upon Mr. *Frederick Hardy's* share. The case so stated was an extremely simple case, and one which entitled the Plaintiffs to the relief which they asked. Now, it has been said on behalf of the Defendants, that there is no case in which the Court has positively decided that notice to the solicitor is notice to the trustee, and that there is no case in which that has been decided without explanation or without reference to the attending circumstances. It would be very hard and very strange if when a man employs a solicitor he was so far bound as to be answerable for any neglect which that solicitor might commit. But there are two cases which have been referred to which in my opinion have a very direct application to the case here, because, although they are both of them cases of order and disposition, and there is no such question here, yet the analogy between the two cases is so close that it is not calculated to mislead any person who considers the principle of the law. If a man having an interest in property does not take proper measures to assert his right by publishing his interest, then in bankruptcy or insolvency he forfeits his right. The absence of the assertion of his own title implies that it is with the true owner's consent that the property, the subject of the security, was left in the ostensible ownership of the man who made the second incumbrance. The other cases which have been referred to do not in the slightest degree negative the proposition that notice to the solicitor in the matter is notice which, by construction, implication, or otherwise, the client may be bound by. The Judges declined to decide it in the two cases which have been mentioned, because it was not necessary for the purpose of decision; but the judgment of Lord *Cairns*, in *Lloyd* v. *Banks* (1), which does not lay down any particular rule, amounts to this in principle, that if the notice given by the claimants, the Plaintiffs in this action, is of such a character as to bring the facts assumed by the notice to

(1) Law Rep. 3 Ch. 488, 490.

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the mind of the trustee, the trustee is bound, although the notice is only given to the solicitor.

That leads me to consider what are the facts relating to this particular property. Under the will of the testator the interest of a legacy of £5000 was given to his wife during her life, and the principal to his children upon her death, *Frederick Hardy* being one of them. The testator died in 1869. He appointed three executors of his will, and directed that the investments should be made in the names of two of them as trustees. For some reason which is not very distinctly explained nor very necessary to be inquired into, the security for the £5000, with a smaller sum, was taken in the name of the widow and *Thomas Hardy*, one of the trustees. It may have been because *Joseph Cornell*, the other executor, had at that time declined to prove, and therefore he could not properly have concurred in the security. From the death of the testator till the middle of 1876, all the business relating to the administration of the testator's, *Hardy's*, property, all that related to the security which was taken, all that related to the interests of the *cestuis que trust*, was entrusted to and conducted by the solicitors Messrs. *Stevens & Bawtree*, who are Defendants on this record. A suggestion has been made, but not very much pressed, that although they were solicitors they were solicitors for the executors, but not for the trustees. It is difficult to distinguish between the two characters they sustained. In every step that was taken, in everything that was done relating to the estate, *Stevens & Bawtree* down to the year 1876 were the solicitors of the executors and the trustees. When an inquiry was addressed to them whether they were solicitors for the executors and the trustees, what answer could they give but that they were their solicitors? Nobody else ever was the solicitor. The letter that made the inquiry requested to have an extract from or copy of the testator's will, and that was a demand that could only be addressed to the trustees through their solicitors. Of course there was no writing to the trustees in the matter, but as an ordinary matter of business the request is complied with and the extract furnished. The correspondence shews what takes place, and on that is built an argument that Messrs. *Stevens & Bawtree* in that transaction were the paid agents of the person who made the inquiry,

and were not acting for the trustees. I find it impossible to follow or adopt any such argument. The trustees were not to be put to any expense because they chose to comply with the request; Messrs. *Stevens & Bawtree* could not make any charge against them, but they were themselves put to expense which it was only right they should be paid for. The payment was in the ordinary course of business, and was such as takes place in every similar transaction.

The title being, therefore, made out in this manner, and there being an assurance that there was no other incumbrance, the Plaintiffs (the society) advance their money in April, 1872. In June, 1872, a meeting of the executors takes place at *Stevens'* office. Now, to use the words of Lord *Cairns* in *Lloyd* v. *Banks* (1), it is requisite that a notice should be distinct. He says, if not in terms, at least impliedly, that it ought to be in writing, and that the notice must be brought home to the minds of the persons addressed. The meeting takes place; one of the objects was to settle, as it is said, a Chancery suit which had been pending, and to settle other matters relating to the estate. The residuary account, which has been produced as part of the evidence in the cause, shews that there was a great variety of matters to be considered, and I am not surprised that as much as three hours was occupied in discussing those matters. The notice was served on the 15th of April. What had taken place in the interval I do not know, but when they met and passed these three hours in discussing the affairs of the estate with their solicitor, at that time there was deposited in the solicitors' safe, and therefore for all purposes in the possession of the trustees themselves, this notice which had been served. Without going into the question of the conflict of evidence, it appears to me quite clear upon the authorities, upon the well-recognised practice of the Court, that the notice which had been given had come home, and was notice to the trustees, because it had been lodged with their solicitors, and by them was retained, and retained until a recent period. I cannot doubt, therefore, but that it ought to be held in this state of facts that it was brought home to the minds of the trustees.

[Upon the evidence his Lordship was of opinion that notwith-

(1) Law Rep. 3 Ch. 488, 490.

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standing the conflict of testimony, the notice sent by the Plaintiff to Messrs. *Stevens & Bawtree* was plainly and distinctly brought to the actual knowledge of the three persons present at the interview of June, 1872. As a matter of evidence, he could not doubt that he ought to prefer the plain statements of Mr. *Stevens* and his clerk, considering their position and considering all the other circumstances of the case, to the statements of the three persons who said that the notice was not read over to them and that they did not know anything about the mortgage to the building society. His Lordship continued:—]

That is the whole of the case, unless I am to hold, as I am invited to do, that notice to the trustees in this formal, business-like, proper, and distinct way, is to go for nothing, and is to be held not to have been communicated to the trustees by being delivered to the solicitors, and that the Plaintiffs' case is upon that head not made out. Am I at liberty so to do? Certainly no case has been referred to in which it has been said that under such circumstances notice to the solicitor shall not be considered as notice to the principal. Certainly, upon the statement of the facts in evidence, I could not come to that conclusion, that these two men, who are men of business, in speaking of a transaction of business, have deliberately perjured themselves, because three persons, who are not people of business, cannot at this time recollect what occurred. Upon the weight of evidence I entertain no doubt, and on the authority of the cases I entertain no doubt, that the notice delivered to the solicitor, deposited by him with the other papers relating to the trust in which he was employed as solicitor, was a good notice brought home to the minds of the trustees in the way the law has authorized and recognised upon many occasions. If that notice was properly given, then the subsequent incumbrancers must be postponed to the Plaintiffs. No doubt when the subsequent incumbrances were effected applications were made to the trustees, *Cornell* and *Hardy*, and each of them said he knew of no incumbrance. It is very possible that in saying that he said what he thought. He may have forgotten it, but that he had forgotten it is no reason why I should prefer his statement to a statement so positive and distinct as that which is made by the two witnesses, because although it is said that one of them has an

interest, yet there are other considerations, and it is not because a man has an interest in a case in a Court of Justice that he, otherwise a man of unimpeachable character, perjures himself. I am of opinion the Plaintiffs have established their title as first incumbrancers of this interest in the estate of the testator.

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MINUTE OF ORDER:—Usual redemption or foreclosure decree. Costs of the Plaintiffs to be added to their debt, and those of *Stevens & Bawtree*, as between party and party, to be paid in the first instance by the Plaintiffs and repaid to them by the Defendants *Hardy* and *Cornell*.

Solicitors: *Andrew & Wood*, agents for *Ackland & Son, Saffron Walden; Paterson, Snow, & Bloxam; Clapham & Fitch; Beaumont & Warren*, agents for *Stevens & Bawtree, Witham*.

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## EARL OF SANDWICH *v.* GREAT NORTHERN RAILWAY COMPANY.



[1875 S. 183.]

*Easement—Riparian Owner—Right to use Water for supply of Engines—Damage to Lower Owners.*

A railway company whose line crossed a stream in the immediate neighbourhood of one of their stations, took water for supplying their engines and for the general purposes of the station. On bill filed by a millowner lower down the stream, it appeared that the abstraction of water did no damage in wet weather, and never shortened the working of the mill for more than a few minutes a day:—

*Held*, that the company, as riparian owners, were entitled to take a reasonable quantity of water for their purposes, and that in this case the quantity taken was reasonable.

23 C.L.D. 567
11 Q.B.D. 163
24 C.L.D. 4

### TRIAL OF ACTION.

Statement.

The bill in the suit, which afterwards became an action, was filed on the 22nd of July, 1875, and as amended on the 14th of June, 1876, was between the Earl of *Sandwich*, the owner, as tenant for life, and *William Garka*, the tenant by demise from him, of the corn mill known as the *Huntingdon Water Mills*, in the borough and county of *Huntingdon*, against the *Great Northern*

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Statement.

*Railway Company*, alleging that the Plaintiffs then recently, that was to say, in the month of June, 1875, for the first time discovered that the Defendants (whose line crossed the river near their station at *Huntingdon*) had for several years past, that was to say, since the year 1866, drawn or taken water from the river *Ouse*, which supplied the Plaintiffs' mill, in large and continuous quantities, for the supply of their engines, and for the general purposes of their station at *Huntingdon;* also that in about 1866, the Defendants, with the view of drawing water from the stream, caused a well to be sunk on their land adjoining the railway and near the stream, caused a nine-inch pipe to be laid from the stream to the well, so as to convey the water from the stream to the well, and caused a suction pipe to be laid from the well under and across the line of railway to an engine pump at their station.

The bill alleged that the Defendants caused these works to be done secretly, without the knowledge of or notice to the first Plaintiff, his steward and tenants, and that they had by means thereof, but in such manner as to conceal their unlawful acts from the first Plaintiff, his steward and tenants, and from the second Plaintiff, diverted and drawn off, and were still diverting and drawing off, large quantities of water, whereby the full and accustomed flow of water to the mill had been and was greatly diminished, and the working of the mill had been and was at times, and especially during dry seasons, seriously impeded, to the injury of the Plaintiffs, as owner and occupier respectively of the mill.

The bill prayed for an injunction to restrain the Defendants from diverting or drawing off the water in such quantity as to diminish the full and accustomed supply thereof to the mill; and by amendment, for compensation to the Defendant *Garka* for the loss and damage occasioned by the Defendants' acts aforesaid.

The Defendants by their answer stated that the flow of water to the mill was, and always had been, much more than sufficient for the proper working of the mill, and that a large quantity of the water ran to waste. They said that from 1850 to the then present time (1876) they had been accustomed to draw such quantities of water as were requisite for the supply of their locomotive engines and for the general supply of the station at *Huntingdon*, but never in

such large quantities as to prevent or interfere with the working of the mill, and that no objection was taken either by the owner or by the miller until June, 1875.

In 1866 a new line of pipes was laid down from the stream to a new well made by the company on the west side of their line, and since 1866 they had continued to draw water in like quantities and for the like purposes as they had been accustomed to do from the year 1850, and not for any other purpose or in greater quantities. The water so taken by the company since 1850 was always so taken by them as of right, and without concealment or interruption of any kind. They said there was no pretence for saying that the flow of water to the mill had not always been sufficient for the working of it; and they claimed the right to take and use the water as riparian proprietors; and if not entitled as riparian proprietors, they claimed the same right by prescription.

Statement.

A considerable body of evidence, both written and oral, was taken, many of the Plaintiffs' witnesses testifying to the fact that there was a deficiency of water during the summer in exceptionally dry seasons, if not generally throughout the year. The Defendants' evidence proved that even in dry weather the mill could not be stopped for more than a few minutes a day by reason of the Defendants' abstraction of the water, and that the level would only be reduced by one-fifth of an inch.

*Hemming*, Q.C., *Bevir*, Q.C., and *Yate Lee*, for the Plaintiff:—

Argument.

The Plaintiff can sustain a bill, without being bound to shew pecuniary damage, because the result of user would be to ripen into a right: *Bickett* v. *Morris* (1); *Attorney-General* v. *Terry* (2); *Wood* v. *Waud* (3). Here there is damage, though small.

It is the right of a riparian owner to prevent diversion by another riparian owner: *Sampson* v. *Hoddinott* (4); *Wilts and Berks Canal Navigation Company* v. *Swindon Waterworks Company* (5); *Harrop* v. *Hirst* (6).

A riparian proprietor can lawfully use water only for the

(1) Law Rep. 1 H. L., Sc. 47, 60.
(2) Ibid. 9 Ch. 429, n.
(3) 3 Ex. 748.
(4) 1 C. B. (N.S.) 590.
(5) Law Rep. 9 Ch. 451, 457; Ibid. 7 H. L. 697.
(6) Law Rep. 4 Ex. 43, 47.

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purposes of the riparian estate: *Medway Proprietors* v. *Earl of Romney* (1); *Wilts and Berks Canal Navigation Company* v. *Swindon Waterworks Company* (2). Not a drop can be taken for such a purpose as the supply of locomotives.

The railway company have acquired no prescriptive right: *Tickle* v. *Brown* (3); *Bright* v. *Walker* (4).

Argument.

Sir *H. Jackson*, Q.C., and *Speed*, for the company:—

The principles laid down in *Bright* v. *Walker* (5) are distinctly in our favour.

The only question is, has the user been within reasonable limits? has there been more than a reasonable quantity taken: *Embrey* v. *Owen* (6).

There has been no concealment on the part of the company; everything has been done openly.

To the use of a reasonable quantity of water every riparian owner is entitled: *Rochdale Canal Company* v. *King* (7); *Medway Proprietors* v. *Earl of Romney* (8); *Dakin* v. *Cornish* (9).

*Hemming*, in reply.

Judgment.

BACON, V.C.:—

The argument in this case has travelled over a very considerable space, and a great many things have been argued which in my view of the case really do not affect or influence the judgment that ought to be pronounced.

The case, after all has been said and done, is reduced to the plainest possible proportions, which are of a very limited kind. That the Plaintiffs and the Defendants are both riparian proprietors is clear. Each of them has equal rights. Neither of them has special or individual rights. Each has a right to that public property which exists in a running stream. Neither of them has any property in the water itself. The question to be decided in all the cases like this that have ever happened, where a

(1) 9 C. B. (N.S.) 575. Jun 15 1846
(2) Law Rep. 9 Ch. 451, 457, 460; S. C. Law Rep. 7 H. L. 697.
(3) 4 A. & E. 369.
(4) 1 C. M. & R. 211, 219–222.
(5) 1 C. M. & R. 211.
(6) 6 Ex. 353, 357, 358, *et seqq.*
(7) 2 Sim. (N.S.) 78.
(8) 9 C. B. (N.S.) 575. Jun 15 1846
(9) Stated at 6 Ex. 360.

riparian proprietor has helped himself to the water in the stream and taken it away for his own purposes, has been, whether he has exceeded the right of enjoyment which he and the other proprietors have, or whether he has simply exercised that right. That is the sole question before me. The Defendants have made use of the water in the stream. If they have only made a reasonable use of it, they have done no more than exercise that enjoyment which is theirs, as much as the Plaintiff has a right to enjoy it for the purposes of his mill.

The cases upon the subject, no doubt, are very numerous. I suppose from the very earliest recorded cases that can be found such questions between riparian proprietors have occasionally presented themselves for discussion and decision. The principle has been laid down so clearly that I think there can be no reasonable doubt about it. Every riparian proprietor has a right to all the enjoyment he can derive from his interest in the stream provided he exercises that enjoyment in a reasonable manner.

Now, what is it said that the Defendants have done in this case? The Defendants are a railway company. They use steam-engines. Water is necessary for supplying the engines at their stations. It is part of the business they carry on. They sink a well by the side of the stream in the year 1850, and from that time to this they have withdrawn water from that well (there was a second one constructed afterwards in another place not connected with the old well), and they have used it for the purpose of supplying their engines with the necessary water. In doing this they have taken as much as they thought requisite for the purpose. What they did want they used, and what they did not they restored back to the stream. *Primâ facie*, no one will say there is anything unreasonable in that. That is the use which a riparian proprietor may reasonably make. He may take the water for irrigation. He may take it, I do not doubt, notwithstanding what Mr. *Hemming* said, for any purposes of his manufactory, whether he is a founder or dyer, or anything else. He may take all that is requisite for the purpose of his business, provided only that he does not take so much as injures the other persons whose rights are equal to his own, which injury he can prevent by returning the requisite quantity into the stream.

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The cases that have been referred to do not in the least justify the Plaintiffs' complaint. The law in the case in the Exchequer, *Embrey* v. *Owen* (1), is laid down in a most elaborate manner by Lord *Wensleydale*. The law was laid down by the late Lord *Kingsdown* in *Miner* v. *Gilmour* (2), in the Privy Council, in very much shorter terms, with a concise felicitousness of expression which all Judges may reasonably envy, but both cases are to the effect that a riparian proprietor has a right to make all the use he can—to derive every benefit he can—from the stream, provided he does not abstract so much as prevents other people from having equal enjoyment with himself.

Therefore the question before me simply comes to this: Is what the Defendants have done reasonable? In itself it is perfectly reasonable. In its quantity it might be unreasonable. Is it? The witnesses for the Defendants and the Plaintiffs differ as to the quantity of the average, but the Defendants' witnesses have not been cross-examined, and I cannot hesitate, as a matter of evidence, to adopt that which they say, when they describe the quantity as being an 1800th part, I think it is—it does not matter what, but a very small part of the whole quantity of water is permanently abstracted from the stream—the rest being restored. They say, moreover, which, to my mind, is a satisfactory test of the facts of this case, that the whole quantity taken by the Defendants does not reduce the depth of the stream by one-fifth of an inch. Mr. *Hemming* has said that the average is not to be trusted, because the abstraction of the water has taken place during a period of drought—perhaps when the injury might be very much greater than if it had taken place in a time of flood—and that the average covers drought and flood. If that were the case submitted for decision, of course it would deserve the most minute consideration, but it is not pleaded. There is no such thing stated. The general statement in the bill is, that they take away water in large and continuous quantities. There is no such issue raised, and I cannot regard it. With respect to the observation that the depth of the stream does not furnish a sufficient criterion, I cannot follow that, because it is the whole volume of the stream that comes against the mill-wheel, and if the whole depth of the stream

(1) 6 Ex. 353, 368. (2) 12 Moo. P. C. 156.

is not reduced more than one-fifth of an inch, with what reason am I to be asked to say that this is an excessive use of that right which the Plaintiffs concede to the Defendants to a certain extent? In my opinion the case by the Plaintiffs, as it is proved by the Defendants, establishes these facts—that the purpose for which the water is taken is a lawful purpose; that it is a reasonable enjoyment of the adjacent property of the Defendants, and the means of carrying on the trade which they may lawfully exercise; that the quantity taken is not in itself excessive, and when the quantity returned to the stream is taken into consideration it is a very small quantity—so small a quantity as that the depth of the stream, taken altogether, is reduced by one-fifth of an inch. Is that a case in which, if there is nothing else in it, the Plaintiff could ask in this Court for an injunction? What injunction is he entitled to? Is there any damage done to him? It is not pretended that there is any damage done to him. The only witness who has been called upon the subject is *Garka*, the miller. *Garka*, the miller, says that his grandfather, his father, and himself, have carried on the business of miller there, and that they have at all times been short of water in the summer months. The drain in question has existed since 1850, and neither *Garka* nor any one else points to any one month or day, or year, during that period, in which the mill works were stopped, because the water had been drawn away. There is no attempt at any evidence upon the subject. There is no reason to believe that the existing state of things differs from that which it has been from the year 1850. Then the evidence which I have before referred to satisfies me that the Plaintiffs' complaint is wholly unreasonable, and that the Defendants have done nothing which the law does not entitle them to do.

The other points which have been argued I need not advert to: that Lord *Sandwich* is tenant for life, and that he is entitled to the protection of the *Prescription Act* of *William* IV. All that I am perfectly satisfied about. I do not stop to make any observations upon it. I take it that the Plaintiffs' right is free and undisputed, the Defendants' right being equally clear. Nothing that the Defendants have done has exceeded the limits of their lawful right to deal with the water, and there is no particle

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of evidence to shew that the Plaintiffs have suffered injury, or that the right which they enjoyed and are entitled to enjoy has been in any degree invaded or interfered with by anything that has been done by the Defendants.

In my opinion the complaint is wholly groundless, and the bill must therefore be dismissed with costs.

Solicitors: *Peacock & Goddard*, agents for *Maule & Son, Huntingdon; Nelson, Barr, & Nelson.*

## LAMING *v.* GEE.

V.-C. H.

1878

Dec. 9.

[1877 G. 21.]

*Practice—Common Administration Judgment against Executor—Subsequent Action by the same Plaintiff charging Wilful Default—Leave of the Court.*

Where a Plaintiff has obtained a common administration judgment against a Defendant, he cannot maintain a subsequent action against the same Defendant charging him with wilful default in the administration of the same estate, unless he has obtained the leave of the Court to bring such action.

The practice in this respect has not been altered or varied by the Judicature Acts or the Rules thereunder.

Statement

THIS was an action by a person representing one of the *cestuis que trust* under a will to charge the three trustees and executors of the will with a breach of trust in selling property subject to the trusts thereof at an undervalue.

Upon the action coming on for hearing, a preliminary objection was taken on behalf of the Defendants that the same Plaintiff had previously obtained, upon an administration summons taken out by him against them, a common decree for the administration of the trust estate; and that therefore he could not now bring an action against the same Defendants charging them with loss by selling the same trust estate at an undervalue, without having first obtained the leave of the Court to bring such action, which leave he had not obtained.

It appeared that the testator died on the 3rd of March, 1872, that the Plaintiff took out the administration summons on the 20th of January, 1875, and that on the 7th of December, 1875, the usual administration order was made in Chambers upon the summons.

The statement of claim contained an allegation that the Plaintiff instituted this former action before he had become aware of the circumstances on which he founded his present action; and the statement of defence pleaded that the present action was ill-founded and unnecessary, and that the Plaintiff might have obtained in the former action such relief, if any, as he was entitled to in respect of the matters complained of in this action.

V.-C. H. 1878 LAMING v. GEE. Argument.

*Bevir*, Q.C., and *Yate Lee*, for two of the Defendants :—

The rule is old and well established that where a Plaintiff has taken the ordinary administration decree against a Defendant, he cannot without the leave of the Court commence against the same Defendant a suit of a different character, praying relief in respect of breach of trust or wilful neglect and default, which is a decree totally different in principle. In *Hodson* v. *Ball* (1) Lord *Lyndhurst* ordered a supplemental bill in the nature of a bill of review filed without leave under similar circumstances to be taken off the file for irregularity, and in that case the Plaintiff alleged that he had first discovered the misconduct of the Defendant in taking the accounts directed by the previous ordinary decree. This rule was also applied by *Kindersley*, V.C., in *Partington* v. *Reynolds* (2), where it was held that where the usual decree had been made, it was immaterial whether it had been made upon bill or upon summons in Chambers; and by *Romilly*, M.R., in *Harvey* v. *Bradley* (3).

In this case the Plaintiff knew of the facts on which he seeks to found his fresh action at the time he took the decree on his administration summons.

*Romer*, for the third Defendant, who had severed in his defence :—

There is no doubt as to the rule under the old practice, and it has not been altered or varied by the Judicature Acts or the Rules thereunder. It is true that in *Job* v. *Job* (4) the Master of the Rolls observed (5): "I think, however, that under the new practice an order charging him (the executor) with wilful default may be made at any time on a proper case being made;" and it was said that this observation implied that the old rule no longer obtained under the new practice; but his Lordship subsequently, in *Mayer* v. *Murray* (6), explained that this was a misapprehension, and laid down that an order charging an executor with wilful default could not be made unless the charge was originally pleaded or introduced by amendment. That is, of course, his Lordship added, "by amendment at any stage of the action at which amendment

(1) 1 Ph. 177.
(2) 4 Drew. 253.
(3) Law Rep. 4 Eq. 13.
(4) 6 Ch. D. 562.
(5) Ibid. 564.
(6) 8 Ch. D. 426.

can be made, *i.e.*, before judgment." This shews that the old rule and practice still prevails upon this point.

In this case the Plaintiff did not take his decree in the original action until ten months after he had issued his summons; and he knew, or must be taken to have known, all the facts on which he now relies when he took that decree, for his statement that his knowledge of these facts was not acquired prior to the issue of the summons amounts to an admission that he knew them when he took the decree.

*Dickinson*, Q.C., and *Chaloner Chute*, for the Plaintiff:—

It is not true that the Plaintiff knew of the facts on which he founds his present action before he took the order in the original action. He did not discover those facts until several months after that order. He then carried in a surcharge in that action, but the Chief Clerk held that he could not have relief upon that surcharge, but must bring a fresh action. The old practice has been altered by the Judicature Act and the Rules of Court, 1875. Under Order XXXIII. the Court may at any stage of the proceedings direct any necessary inquiries or accounts to be made or taken, and this applies to the whole course of an action both before and after judgment. All that *Job* v. *Job* (1) and *Mayer* v. *Murray* (2) amount to is that wilful default should be pleaded or introduced by amendment; but in the original action there were no pleadings, and therefore there could have been no amendment, even if we had discovered the new matter before judgment. In *Harvey* v. *Bradley* (3), where the Master of the Rolls held that leave was necessary to bring a fresh action, he did so on the ground that the Plaintiff, who was the Defendant in the original action, might have pleaded the wilful default by answer therein. In this case there was no other course open to the Plaintiff except to bring the present action, and if leave is necessary the Court can give it now; the objection, however, is one which if taken at all ought to have been properly and specifically taken on the pleadings, and not having been so taken, it will be disregarded by the Court.

*Bevir*, in reply.

(1) 6 Ch. D. 562. (2) 8 Ch. D. 426.
(3) Law Rep. 4 Eq. 13.

V.-C. H. 1878 LAMING v. GEE. Judgment.

HALL, V.C.:—

The first question I have to determine is whether this case is now rightly before the Court for hearing, the old practice having clearly been that under circumstances such as these a new action could not have been commenced without the leave of the Court. Upon this question it is said that the old practice has been changed in some way, and it is suggested that, notwithstanding the judgment delivered in the original action, accounts or inquiries might now, under the Rules of Court, Order XXXIII., be directed at any stage of the action. Now the Master of the Rolls, in the case before him (which was one of wilful default of a similar character to the present), laid down, as I consider, that in these cases the new matter must be introduced by amendment of the pleading, so as to get it on the pleadings. Supposing, however, that another view were taken, and that the Plaintiff might get it on even after the judgment by means of an application in Chambers made under that order; still that application would be made upon an affidavit shewing the merits, which would be gone into upon the hearing in Chambers, and such a course of procedure might possibly suffice, as being equivalent to obtaining the leave of the Court to make that special addition under the circumstances. Now, supposing that to be so, still you must in any case have the leave of the Court for the purpose of bringing forward any new case which might have been made the subject of complaint in the original action if the facts had been known. I see nothing in the *Judicature Act* to take away or alter the old practice of getting the leave of the Court for such a purpose. That practice was a salutary and valuable one. It was originally instituted for very good reasons, and, as I conceive, notwithstanding the *Judicature Act*, those reasons still remain. It seems to me, therefore, that it was necessary to obtain that leave in some form or another before the institution of this action; and by obtaining leave, I mean obtaining it in the presence of the parties sought to be charged with the breach of trust, so as to give them an opportunity of being heard upon the question. That leave has not been obtained in this case, and therefore it appears to me that this action cannot be sustained. Then it is said that, upon the pleadings as they stand, the objection has not been taken in a form which would

justify the Court in considering it. The Plaintiff, in his statement of claim, alleges that he instituted the original action before he became aware of the circumstances on which the present action is founded; that statement is confined to his state of knowledge at the time of the institution of the action, and although nearly a year elapsed between the institution of the suit and the delivery of the judgment therein, he does not state what his knowledge was at any time subsequent to the commencement of the action. In the defence it is stated that the action is ill-founded and unnecessary, and that the Plaintiff might have obtained in the action of *Laming* v. *Smith* such relief, if any, as he is entitled to in respect of the matters complained of in this action. That does not in so many words say that the Plaintiff might, if he had had a case and had applied in the proper way, have extended that action so as to meet that case, and it does not in so many words say that he knew all that he now knows, and that he had a sufficient amount of knowledge to amend his pleadings, or, at all events, if necessary (and under the circumstances of that case, in which there were no pleadings, it would have been necessary), to have applied for, and to have obtained, leave to have delivered a statement of claim. Under those circumstances I think that, by analogy to the old practice, this action ought to have been preceded by an application for leave to bring the action such as I mentioned; and, adverting to the form in which the objection is stated in the statement of defence, although it does not in terms say what I have indicated, still, the objection being taken at the Bar before the opening of this case, I cannot say that it has been waived, or that it is not competent for the Defendant so to take it. That is my view of the procedure, both before and since the new Act, upon this part of the case.

I think, however, that in fairness towards the Plaintiff, the Defendants ought not to have allowed all the expense of bringing this action to trial to be incurred without giving specific notice to the Plaintiff of the objection which they intended to take; and under all the circumstances of the case, if it can be shewn that the Plaintiff did not acquire the information on which he founds his present case in time to utilize it in the former action, I shall treat

V.-C. H. 1878 LAMING v. GEE. Judgment.

this hearing as comprising an application for the leave of the Court to bring the action.

The Plaintiff then proved by evidence that he first obtained the information in question from the inspection, on the 13th of November, 1876 (ten months after the administration order in the first action), of certain documents specified in an affidavit of documents made on the 6th of July, 1876, in the course of the proceedings in Chambers under the order and then first produced to him.

HALL, V.C., upon this evidence, gave the leave of the Court to bring the present action, and the action was heard upon the merits (which do not call for a report), and in the result dismissed with costs.

Solicitors: *Wright, Bonner, & Wright; Peacock & Goddard,* agents for *Thompson, Phillips, & Evans.*

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V.-C. H. 1878 Dec. 16, 17.

## *In re* GOVERNMENT SECURITY FIRE INSURANCE COMPANY.

### WHITE'S CASE.

*Company—Fully paid-up Shares—Payment in Cash—Allotment in Consideration of Services rendered—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

12 L.D. 853

The proprietor of a newspaper agreed with a company to insert for them a series of advertisements in his newspaper, and to accept fully paid-up shares of the company in payment of his account for so doing. He inserted the advertisements, and sent his account to the company. The company accepted the account, and subsequently allotted to him fully paid-up shares to amount thereof. The contract was not registered in pursuance of the *Companies Act*, 1867, s. 25, and the company was afterwards wound up:—

*Held*, that as the services contracted for had been actually rendered before the shares were allotted, there was at the time of the allotment a debt payable in money by the company to the allottee, in respect of which he could have sustained a plea of payment in an action by the company for calls,

and, therefore, that the shares allotted must be treated as having been paid for in cash within the principle of *Spargo's Case* (1).

The newspaper proprietor also, in pursuance of a similar agreement with the same company, inserted further advertisements in respect of which no allotment of shares had been made to him at the commencement of the winding-up:—

*Held*, that he was entitled to prove in the winding-up for the amount due to him for such further advertisements.

*Pagin & Gill's Case* (2) and *Andress' Case* (3) distinguished.

Revd by Chief Offr 12 Ch D 311 Ca 97

ADJOURNED SUMMONS.

Statement.

The *Government Security Fire Insurance Company* was incorporated on the 17th of November, 1875.

In the month of November, 1876, the company entered into an agreement with Mr. *White*, the proprietor of the *Ulster Gazette*, that he should advertise their prospectus in his newspaper upon the terms stated in a letter dated the 29th of March, 1876, from the secretary of the company to Mr. *White*, the material part of which was as follows:—

"I beg to acknowledge the receipt of your letter of the 25th instant. You may insert for a period of three months in the *Ulster Gazette* the enclosed prospectus as abridged, provided that you are willing to accept payment of your account in fully paid-up shares of the company."

Mr. *White* accordingly advertised the prospectus during the period between the 8th of April and the 1st of July, 1876. On the 1st of July, 1876, he sent to the company an account shewing the sum of £25 8*s.* 8*d.* as due to him for the advertisements issued to that date. The company accepted his statement of account, and on the 16th of August, 1876, issued to him, as fully paid up, six shares of £5 each, entering these shares in their register as fully paid up. On the same day the secretary sent him the certificates in a letter containing the following passage:—"Herewith is certificate for six fully paid-up shares. Kindly carry the balance to the next account, and please return us your account duly receipted." Mr. *White* thereupon returned his

(1) Law Rep. 8 Ch. 407. (2) 6 Ch. D. 681.
(3) 8 Ch. D. 126.

V.-C. H. 1878

WHITE'S CASE.

Statement.

account receipted thus: "Paid in scrip. *T. White.*" The following entry appeared in the company's cash book:—

| | |
|---|---|
| "By advertising accounts as per contract with various newspapers on the conditions agreed with the various proprietors, *i.e.*, that they invest the amounts of their accounts in fully paid shares of the company" . . . . . | £18,216 12 4 |

This sum of £18,216 12*s.* 4*d.* included £30 in respect of the shares so issued to Mr. *White.*

The contract with Mr. *White* was never filed with the Registrar of Joint Stock Companies pursuant to sect. 25 of the *Companies Act*, 1867.

The company made similar arrangements with Mr. *White* for the issue of further advertisements, which were duly inserted, and there was due to Mr. *White* for these further advertisements the sum of £45, but no shares had been issued to him in respect thereof.

A resolution for the voluntary winding-up of the company was passed on the 8th of November, 1877, and the liquidator having placed Mr. *White* upon the list of contributories in respect of the six shares standing in his name, Mr. *White* in his case contended that five of the six shares issued to him having been issued in respect of work and labour done and completed for the company at the date of the issue thereof, such shares should be treated as paid up in full, and that accordingly he should not be placed upon the list of contributories; that if the Court should be of opinion that a contract ought to have been made and registered, then the allotment should be cancelled, and the register rectified, in order that the contract should be registered and the shares re-issued to him. And he claimed to rank as a creditor for the £45, which was the value of the work done by him for which, at the commencement of the winding-up, no shares had been issued to him, and that, if fixed upon the list of contributories in respect of five of the shares issued to him, he should be admitted to rank as creditor for £25 by way of damages for the non-issue to him of five fully paid-up shares of £5 each.

*Eddis*, Q.C., and *E. C. Willis*, for Mr. *White*, in support of the summons:—

The five shares in question have been paid for "in cash" within the meaning of the 20th section of the *Companies Act*, 1867. *Pagin & Gill's Case* (1) and *Andress' Case* (2) are distinguishable upon the ground that here the services in payment for which the shares were given had been actually rendered before the shares were allotted. The advertisements having been already inserted, and the amount due for them agreed, there was, at the time of the allotment, a *bonâ fide* debt in money of an ascertained amount due to Mr. *White*, which he was entitled to set off against the amount due from him in respect of five out of the six shares issued to him. The allotment was therefore, as to the five shares at all events, a *bonâ fide* allotment of shares in payment of a debt of equal amount, and this, upon the authorities, is equivalent to payment "in cash" by the shareholder: *Spargo's Case* (3), *Fothergill's Case* (4), *Ferrao's Case* (5), *Adamson's Case* (6), *Pellatt's Case* (7), *Elkington's Case* (8), and *Hartley's Case* (9).

Secondly, if the contract in this case was void at all, it was void altogether: *In re British Farmers Pure Linseed Cake Company, Nicholl's Case* (10); and the issue of shares not being in pursuance of any contract, Mr. *White* was entitled to treat his services rendered as payment in full for them.

Thirdly, Mr. *White* is at any rate entitled to rank as a creditor for £45, the value of the further work for which no shares were issued to him.

*Hastings*, Q.C., and *John Cutler*, for the liquidator:—

This case cannot be distinguished in principle from *Pagin & Gill's Case* and *Andress' Case;* for in all three cases it was the essence of the contract that the company should never pay any cash at all. There never was a *bonâ fide* debt in money payable immediately by the company to the shareholder, so as to

(1) 6 Ch. D. 681.
(2) 8 Ch. D. 126.
(3) Law Rep. 8 Ch. 407.
(4) Ibid. 270.
(5) Ibid. 9 Ch. 355.
(6) Law Rep. 18 Eq. 670.
(7) Ibid. 2 Ch. 527.
(8) Ibid. 511.
(9) Ibid. 18 Eq. 542; 10 Ch. 157.
(10) 7 Ch. D. 533; 3 App. Cas. 1004.

V.-C. H. 1878 ~~ WHITE'S CASE. Argument.

bring the case within *Spargo's Case* (1) and the other authorities referred to. The only remedy Mr. *White* could have would be for damages against the company for not having fulfilled their contract by delivering to him fully paid-up shares. It cannot be said the contract was void, for the statute does not make such contracts void, but only requires them to be registered, and, except for the enactments of the 25th section, this contract was perfectly valid, and Mr. *White* could not have pleaded payment in case the company had sued him upon it. With regard to the claim to rank as a creditor for £45, the claimant can only be entitled to prove for damages for non-delivery of shares to that amount; and there must be a reference to Chambers to ascertain the value of the shares at the date of the breach of the agreement, though, in fact, the shares never had any value.

Judgment.

HALL, V.C.:—

This is, in my opinion, a very difficult case, but I think that the holder of these shares is entitled to be considered as in the position of a creditor of this company for the amount of these advertisements. The circumstances of this case distinguish it from *Andress' Case* (2) and the prior case before me of *Pagin* and *Gill* (3). At the time when the shares in the present case were actually issued the position of the parties was this: Mr. *White* had entered into a contract with the company by which he was to be paid for his advertisements by certain fully paid-up shares. That contract not being registered under the 25th section of the Act, was inoperative, at all events so far as regarded the stipulation that he should have shares which were fully paid up; so that, if the shares are to be treated in law as not being fully paid up, Mr. *White* certainly does not get what he bargained for. He did the work, however, and a certain time after the work was actually done an account was sent in by him—an account undoubtedly based upon the agreement which he had entered into to take fully paid shares. There being at that time a sum of £25 and a few shillings owing in respect of work done (which £25 would cover and represent five fully paid-up shares), he made

(1) Law Rep. 8 Ch. 407. (2) 8 Ch. D. 126.
(3) 6 Ch. D. 681.

out his account and sent it in; and, acting upon this, the company then issue to him five (for I treat the issue of six as a mistake) fully paid-up shares as being the payment to which he was entitled.

It is contended, however, that Mr. *White* upon the shares being issued to him became liable to pay calls upon them, and that there was no money owing to him by the company against which such calls could be set off, so that if he had been sued for the calls he could not have pleaded payment. As to that, it is necessary to consider what was the real position of the parties. It is said on behalf of Mr. *White*, and not disputed, that he had a claim against the company for services done; it is not said on behalf of the company that he had no claim against them at all, and that nothing was to be paid. That I consider understood. What is said, however, is this: that Mr. *White's* claim against the company was not for the £25, which was the amount of the account he sent in for the services he had rendered, as against which he was to be entitled to fully paid-up shares to a corresponding amount, but that his claim was simply one for damages of some amount or other for not giving him fully paid-up shares. Under the circumstances of this case, the company could not give him fully paid-up shares, because the contract was not registered; therefore, for the company to say to Mr. *White*, with whom they contracted, "Your remedy being upon a contract which the company could not carry into effect by giving you fully paid-up shares" (unless, indeed, one or other of the parties had within the proper time caused it to be registered), "is only for damages against the company for not delivering to you fully paid-up shares," and at the same time to say to him, "The contract is altogether inoperative so far as regards fully paid-up shares, and the company is not bound by it," is a course of argument which cannot be allowed.

What, then, was the company's liability? As I said before, it is not disputed that there is some claim against the company. The claim is no other than this, that this party was entitled to be paid for his services, for work and labour done; and, having sent in an account which was admitted to be and treated as correct, and shares having been allotted in respect of that account, it must, I

V.-C. H. 1878. WHITE'S CASE. Judgment.

think, be taken that if the company had sued him for £25 for calls on five shares, he would have been entitled to say, "It is true I was liable for the calls, because the contract was not registered in accordance with the Act of Parliament, and therefore you had no business to give me under the contract fully paid-up shares, but I have a claim for services, and the amount of that claim is equal to or exceeds the amount which you are demanding of me for the calls; therefore I say that is payment to you of the £25, because I have done work for you to that amount; and I have sent in to you the account stated shewing that amount, and you have recognised and accepted it as the sum owing by you to me in cash in respect of those services. Therefore I say I have paid you, because I have a corresponding amount payable by you to me in cash for those services."

There is nothing in the authorities cited which covers this point. So far as there are observations bearing on it, there are some which, taken literally, tend to shew that the whole contract is void from beginning to end. If that were so, this would clearly be a case in which the party would be entitled to set off, or rather to plead payment in respect of an ascertained amount acknowledged by the company to be payable. But even if that is too literal a construction to put upon those observations, still it seems to me to come round to what I have already said as to the position of the parties and their several rights as respects payment by each to the other of them of certain undisputed amounts at the time when the allotment of the shares took place. The illustration which was given by the Master of the Rolls in *Andress' Case* (1) was this: he said, "If I say to a newspaper proprietor 'If you will insert this advertisement for me I will give you a horse,' can that be made out to be a payment in cash?" Well, the difference between a horse and shares is this, that the company could certainly give a horse, because they could get a horse, but, inasmuch as the contract is not registered in this case, the company could properly give cash owing by them for cash becoming due on shares. On the whole, I consider that this case is brought within the principle of *Spargo's Case* (2) rather than within the principle of the other cases cited, and therefore that *White* is entitled to have the five shares allotted

(1) 8 Ch. D. 126. (2) Law Rep. 8 Ch. 407.

to him treated as fully paid-up shares; and I also consider him entitled to rank as a creditor for £45, which the case states to be the proper value of the further work done by him; I consider his claim a claim in respect of services rendered and not of breach of contract. This will of course leave one share on which he will be liable.

V.-C. H. 1878 WHITE'S CASE.

Solicitor for *White*: *C. M. Elborough.*
Solicitor for Liquidator: *J. S. Salaman.*

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## RICHMOND *v.* WHITE.

V.-C. H. 1878 Dec. 18.

[1876 R. 235.]

*Executor—Payment into Court in the Presence of—Right of Retainer.*

In an action by residuary legatees against an executor to administer an insolvent estate, after the usual judgment had been taken, an order was made in Chambers on the application of the Plaintiffs and in the presence of the executor, pursuant to which an insurance company paid policy moneys into Court to the credit of the cause. Upon the further consideration of the action the executor, who was a creditor of the testator, claimed to retain his own debt out of the moneys so paid in, in priority to the costs of the action and the debts of the creditors:—

*Held*, that the payment into Court was not in substance a payment in by the executor, and that, as the fund was never actually in his hands, and he might have protected himself when it was paid in, he had no right of retainer or payment in priority thereout.

The right of an executor to retain his own debt is not a right which this Court is disposed to extend.

Rule by Jessel 12 Ch D 361. CA

FURTHER consideration of an administration action. Statement.

This was an administration action by infant residuary legatees against the executor of the will. The ordinary administration decree had been made, and the estate had proved insolvent.

Upon the action coming on upon further consideration, it appeared that part of the testator's assets had consisted of the moneys payable under a policy of assurance upon his own life, which moneys were subject to an equitable mortgage; and that, pursuant to an order made on application by the Plaintiffs in Chambers during the course of the action, on which application the executor appeared, the insurance company had paid off the

V.-C. H. 1878

RICHMOND v. WHITE.

equitable incumbrancer and had paid the balance of the policy moneys into Court.

The executor, who was a creditor of the testator, now claimed to retain his own debt out of the fund so paid into Court by the insurance company, in priority to the costs of the suit and the debts of the creditors.

Argument.

*Phear*, for the Plaintiffs, stated the case.

*Dickinson*, Q.C., and *Macnaghten*, for the executor:—

The right of the executor to retain his own debt out of a fund in Court in priority to the costs of the suit and the debts of the creditors is well established: *Chissum* v. *Dewes* (1), *Daniell's* Chancery Practice (2) and cases there cited; and it is immaterial whether he has himself paid in the fund, or has concurred with others in so doing.

Judgment.

HALL, V.C.:—

In this case the executor might have protected himself when the fund was paid into Court. It never was actually in his hands, for I cannot consider that the payment into Court in this case was in substance a payment in by the executor. Therefore, in the absence of authority that it must be so treated, I shall not allow the right of retainer. That right is one which I am not disposed to extend.

Solicitors: *Russell, Son, & Scott; Pike & Son.*

(1) 5 Russ. 29. (2) 5th Ed. p. 1288.

## *In re* MASON AND TAYLOR.

V.-C. H.
1878
Dec. 19.

*Solicitors acting for a Company and for Trustees of Debenture Holders—Mortgagees' Title Deeds—Mortgagor's Costs—Solicitor's Lien.*

Solicitors of a company who, upon the occasion of the directors conveying all the property of the company to two of their body upon trusts to secure the repayment of moneys borrowed upon debentures, prepare a mortgage deed and act for the company and the trustees, have no right of lien for the payment of their costs.

The decision in *In re Snell* (1) followed.

Statement.

MESSRS. *Augustus Mason* and *Robert Taylor*, constituting the firm of Messrs. *J. Taylor, Mason, & Taylor* (and hereinafter called the firm), were in March, 1872, appointed the solicitors of the *San Pedro* (*Chili*) *Copper Mining Company, Limited.* The company, incorporated under the Companies Acts of 1862 and 1867, became in 1872, by certain deeds, executed in March and April of that year, the owners of mines and premises described therein. Prior to 1876, and in that year, meetings of the company and transactions by the directors took place in reference to the issuing of debentures, and in March, 1877, in pursuance of a resolution of the directors passed in December, 1876, a deed was prepared by the firm and was executed by the necessary parties, by which the company's property was vested in Messrs. *J. T. Tweed* and *S. Olding* (two of the directors) as trustees to secure the due payment, *pari passu*, of the debentures and the interest thereon, and subject thereto upon trust for the company.

In April, 1878, the company passed a resolution to wind up voluntarily, and in May, 1878, an order was made to continue such winding-up, but under the supervision of the Court.

In May, 1878, two actions were commenced against Messrs. *Tweed* and *Olding* and the company for the administration of the trusts of the deed under the direction of the Court, for a sale of the mines and premises, and for the appointment of a receiver; and by an order made in both actions it was ordered that a proper person should be appointed receiver and manager of the property,

(1) 6 Ch. D. 105.

V.-C. H. 1878 *In re* MASON AND TAYLOR. Statement.

and that Messrs. *Tweed* and *Olding* should deliver over to him all the deeds and documents relating thereto. A receiver was by a subsequent order appointed.

The firm acted as solicitors for the company down to the 25th of July, 1878, and they had been paid their costs of preparing certain deeds dated in 1872, 1874, and 1875, but the costs of preparing the deed of March, 1877, had not been paid, and they claimed to have a lien upon the title deeds and other documents, and refused to give them up till their costs were paid. In preparing the deed of March, 1877, the firm acted not only as solicitors for the company, but also for Messrs. *Tweed* and *Olding*, who, however, in their affidavits deposed that they consented to become trustees on the understanding and assurance that they were incurring no personal responsibility whatever.

In a correspondence which took place between the solicitors of the trustees and the firm it appeared that the costs for which a lien was claimed were not, as originally, the general costs due to the firm from the company, but the costs of preparing the deed of March, 1877, and incidental to the preparation thereof and completion of the matter. The correspondence was brought to a close without a satisfactory result. The possession of the deeds by the trustees was necessary for the purpose of offering the property for sale.

The firm received their instructions chiefly through the secretary of the company, who represented the trustees (two of the directors) as well as the board of directors in the matters, and in addition to preparing the deed the firm caused certain documents to be registered at *Chili* in accordance with the *lex loci*. No money passed at the time of the completion of the deed of March, 1877, and that and all other documents were left in the possession of the firm. There was no covenant in the deed against incumbrances. The firm submitted that the charges of and incidental to the preparation and completion of the debentures and the deed were primarily fair and proper charges against the trustees, and that the firm had a lien on all the deeds and documents in their hands until such charges were paid, but they were willing to leave the items in their bill of costs to the Taxing Master.

V.-C. H. 1878 *In re* MASON AND TAYLOR.

Statement.

This was a motion on behalf of the two trustees that the firm might be ordered to deliver up to them all the deeds and muniments of title to the property; or, if the Court should be of opinion that any costs were due from the trustees for which the firm had a lien on the deeds and documents, that such costs might be taxed, and that on payment of them the firm might be ordered to deliver up the deeds and documents, and to pay the costs of this application.

Argument.

*Hastings*, Q.C., and *Grosvenor Woods*, for the trustees, referred to *In re Snell* (1) and *In re Sadd* (2), and submitted that the solicitors had no right to a lien upon the deeds and documents which belonged to the trustees or mortgagees, whose security they were bound to see perfected by the delivery up to them of the deeds and documents.

*Dickinson*, Q.C., and *Maidlow*, for the firm of solicitors, referred to the case of *Pratt* v. *Vizard* (3), and submitted that the claim of lien by the firm was not for costs due to them from the company or mortgagors, but for costs due to them from the mortgagees, for whom it was their duty to act, they being the firm's clients in the matter of preparing the deed of March, 1877. The propriety of the charges, and the amount to which they were entitled, could be left to the Taxing Master. The motion ought to be refused with costs. They distinguished *In re Snell* and *In re Sadd* in regard to some of the facts, and referred to the cases of *Faithfull* v. *Ewen* (4), *Rigby* v. *Daking* (5), *Wakefield* v. *Newbon* (6), and *In re Messenger* (7).

Judgment.

HALL, V.C.:—

I think I cannot refuse this application, looking at the decision and the principle laid down in *In re Snell*. The only distinction between that case and the one before me is the fact that the costs of the trust deed had been paid by the trustees, but I do not con-

(1) 6 Ch. D. 105.
(2) 34 Beav. 650.
(3) 5 B. & Ad. 808, 813.
(4) 7 Ch. D. 495.
(5) 2 Y. & J. 83.
(6) 6 Q. B. 276.
(7) 3 Ch. D. 317.

V.-C. H. 1878 *In re* MASON AND TAYLOR. Judgment.

sider that material for the present purpose. The Master of the Rolls said that he had decided the point before, and that his predecessor had decided it more than once. It appears to me that it is a just conclusion from all the facts in this case, that the trustees were acting through and employing the solicitors of the company, but in this sense, that they did not undertake, nor expect to undertake, any personal liability in respect of payment for the preparation of the deed. They accepted the office of trustee for the purpose of securing the debenture holders, and their services were made use of because they were directors of the company. Although the trustees might properly, as well as the company, be considered as the clients of the solicitors in regard to the preparation of this deed, yet I cannot collect from the circumstances of the transaction that there was any liability on the part of the trustees to pay personally the costs of it. That being so, still the solicitors had a duty to perform to them, and that duty was to get a proper security; and part of that duty was the delivery up of the deed. And when, in *In re Snell* (1), the Master of the Rolls spoke of the deeds or title deeds he referred to the mortgage deed itself with all the deeds. That is the principle of the decision in that case, and I shall follow and act upon it. The trustees have the deed virtually in their possession, though it was left in the hands of the solicitors; but to hold that the solicitors have a lien upon it which must be paid off by the trustees would be to defeat the object of the deed, and the performance of the trusts contained in it. Therefore I am of opinion that all the title deeds must be delivered over to the trustees, as I hold that the solicitors have not a lien. I think the case of *In re Sadd* (2) supports the trustees' view; and the other cases I need not refer to as they do not approach the one before me.

Subsequently it was arranged between the parties that the firm should be paid certain costs, and the Vice-Chancellor directed that the order now made should not be acted upon till after the 11th of January, 1879.

Solicitors: *Stibbard, Gibson, & Co.; Taylor, Mason, & Taylor.*

(1) 6 Ch. D. 105. (2) 34 Beav. 650.

## BIBBENS *v.* POTTER.

V.-C. H.
1879
Jan. 11.

[1875 B. 194.]

*Will and Codicil, Construction of—Absolute Gift by Will—Gift by Codicil of what "may then be remaining"—Absolute Gift cut down to Life Interest.*

13 Ch D 14
146.

*E.* and *A.*, sisters, were tenants in common of freehold and leasehold property.

*E.* by her will gave all her estates and effects, both real and personal, to *A.* absolutely, and by a codicil which she directed to be taken as part of her will she gave, after the death of *A.*, "all property of mine which may then be remaining" (except a house and furniture) "to my brother *W. B.*" and three other persons in certain proportions, "my brother *W. B.* to have one-half of the property for his whole and sole disposal."

*A.*, who survived *E.* a year and eight months, remained in possession of the whole of the property, and by her will gave a portion of it to *W. B.* for life only, and after his death to other persons.

On bill filed by *W. B.*, for administration of both estates:—

*Held*, that the intention of *E.* was, construing the two instruments together, that *A.* should have a life interest only in her property.

### FURTHER CONSIDERATION.

Statement.

*Emily Bibbens*, who died in July, 1873, by her will, made in April, 1865, gave all her estates and effects, both real and personal, unto her sister, *Ann Maria Bibbens*, for her own use and benefit absolutely, and free from the debts and engagements or control of any husband to whom she might be married, and she appointed her sister sole executrix.

*Emily Bibbens*, by a codicil to her will, made in September, 1868, and which she directed to be taken as part thereof, said:—"After the death of my sister *Ann Maria Bibbens*, I give, devise, and bequeath all property of mine, which may then be remaining (except our house and furniture at *St. Mary Church*), to my brother *William Bibbens*, to *William Ero Potter*, *Charles Augustus Potter*, and *D. E. Selwig*," a sister of the *Potters*, "to be divided in the following way: my brother *William Bibbens* to have one-half of the property for his whole and sole disposal, and the other half to be equally divided between the above-named *W. E. Potter*, *C. A. Potter*, and their sister."

*Ann Maria Bibbens*, who died in March, 1875, by her will, made

V.-C. H. 1879 BIBBENS v. POTTER. Statement.

in October, 1873, gave certain parts of her property to her brother *William Bibbens* for his life only, and after his death to other persons named, and the other parts of her property she gave to other persons named, *Charles Augustus Potter* being one of them.

*Emily Bibbens* and *Ann Maria Bibbens* were originally entitled as tenants in common to undivided equal moieties of a leasehold house, and the furniture and effects therein; five leasehold cottages and gardens; two freehold cottages and gardens and a parcel of freehold land situate near them; and a policy of assurance.

The bill was filed in June, 1875, for the administration of *Ann Maria Bibbens'* estate, and there was a prayer for (if proper in this suit) the administration of *Emily Bibbens'* estate, and for a declaration of the rights of the Plaintiff and all other persons in the estates of both sisters, and for consequential relief.

The question now was, whether, upon the true construction of the will and codicil of *Emily Bibbens*, her sister, *A. M. Bibbens*, took an absolute estate, or only a life interest in the property disposed of by them, with a remainder to the other persons named.

Argument.

*Eddis*, Q.C., and *Everitt*, for the Plaintiff *William Bibbens*: —

The question raised here must be determined in accordance with the decisions in *Re Adams' Trusts* (1) and *Constable* v. *Bull* (2), which are directly in point; and there are many other cases which might be referred to upon the subject, as for instance, *Perry* v. *Merritt* (3); *Holmes* v. *Godson* (4); *In re Stringer's Estate* (5); *Shaw* v. *Ford* (6); *Green* v. *Marsden* (7); *Cowman* v. *Harrison* (8); *Breton* v. *Mockett* (9); *Parnall* v. *Parnall* (10); *Cooper* v. *Williams* (11); *Gibbs* v. *Tait* (12); *Surman* v. *Surman* (13); *Jarman* on Wills (14); and *Theobald* on Wills (15); but they do not

(1) 14 W. R. 18. 1 Jur. N.S. 961
(2) 3 De G. & Sm. 413.
(3) Law Rep. 18 Eq. 152.
(4) 8 D. M. & G. 152. 2 Jur. N.S. 383
(5) 6 Ch. D. 1.
(6) 7 Ch. D. 669.
(7) 1 Drew. 646.
(8) 10 Hare, 234. 17 Jur. 313.
(9) 9 Ch. D. 95.
(10) Ibid. 96.
(11) Prec. Ch. 71.
(12) 8 Sim. 132.
(13) 5 Madd. 123.
(14) 3rd Ed. vol. ii. p. 265.
(15) Page 249.

govern this case. There can be no doubt, it is submitted, that the absolute estate which was conferred by the will upon the sister was cut down to a life interest by the codicil, and that the Plaintiff is entitled to one-half of *Emily's* estate.

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*Chester*, for the first and second Defendants; and

*Hastings*, Q.C., and *B. B. Rogers*, for other Defendants in the same interest.

*Dickinson*, Q.C., and *G. Daw*, for the Defendant *Charles Augustus Potter*:—

There was a clear and absolute gift by the will of *Emily*, which passed the entire interest which she had in the property. *Constable* v. *Bull* (1) was a case in which the property disposed of was of a terminable character, and therefore it does not, nor does *Re Adams' Trusts* (2), apply. In *Ross* v. *Ross* (3) the principle laid down governs all these cases; and the whole current of authorities, excepting the two cases first cited, support the contention that *Ann Maria Bibbens* was entitled absolutely, and that what at her death might "then be remaining" she had a complete and absolute right to dispose of. Therefore those persons to whom she gave her estate are entitled to the judgment of the Court.

HALL, V.C.:— Judgment.

I am of opinion that this case is governed by the decision in *Constable* v. *Bull*, and that that is a rational construction of the two instruments. No doubt *Emily Bibbens* gave to her sister, by her will, an absolute estate, but by the codicil, which she directed to be taken as part of her will, and which I read with the will, she altered the provision which she had made for her sister. There was clearly an intention on her part that what was given by her will should go in another way, and therefore I hold that the codicil must have effect given to it.

Solicitors: *E. W. & R. C. Mote*, agents for *Carter & Son, Torquay*; *Coode, Kingdon, & Cotton*, agents for *Thomas Floud, Exeter*.

(1) 3 De G. & Sm. 413. (2) 14 W. R. 18. 11 Jur. N.S. 961.
(3) 1 Jac. & W. 154.

V.-C. H.
1879
Jan. 18.

## WESTON *v.* SAVAGE.

[1878 W. 138.]

*Assignment of Lease of Public-house—Contract for a Term certain—Lessors' Right of Option to determine Lease—Contract rescinded—Deposit Money returned.*

*S.*, being in the occupation of a public-house, contracted with *W.* to sell to him the residue of the lease, of which twelve and a half years at least were unexpired. *W.*, the day after signing the contract, by which he agreed to take possession on the 15th of April, 1878, paid a sum as a deposit to *S.*'s agent. The abstract of title shewed that *S.*'s lessors had a right of option to determine the lease at the end of five years, and *W.* at once rescinded the contract, and required the return of the deposit money. *S.* refused to repay the money, and *W.* issued a writ in his action on the 10th of April to recover it:—

*Held*, that *W.*'s objection to the title was valid; that he was not bound to wait till the 15th of April before issuing the writ; and that he was entitled to repayment of the deposit money with interest.

Statement.

BY his statement of claim, filed on the 8th of June, 1878, the Plaintiff alleged that in March, 1878, the Defendant, being in the occupation of the *Red Lion* public-house, situate at *Southall*, represented to him that he was entitled to the premises under a lease for a term of which at least twelve and a half years from Lady Day, 1878, were unexpired, subject to the yearly rent of £150, and that he, upon the faith of such representation, entered into negotiations with the Defendant for the purchase of the house for the residue of the term.

On the 18th of March, 1878, the parties executed an agreement whereby the Defendant, in consideration of £100 to him to be paid by the Plaintiff by way of deposit, and of a further sum of £750 to be paid by him at the times therein mentioned, agreed with the Plaintiff to furnish and adduce a proper title, subject as hereinafter mentioned, and well and effectually to assign to him the lease of the premises and all his right, title, and interest therein and the goodwill thereof for the remainder of the term then to come and unexpired therein, which was "twelve and a half years at least from Lady Day next, subject to the yearly rent of £150 and the performance of the covenants thereby reserved and contained.

The Defendant further agreed to deliver up quiet possession of the premises to the Plaintiff on or before the 15th day of April, 1878, and to pay certain rates and taxes, and to assign the licenses; and the Plaintiff agreed to accept an assignment of the lease without requiring the production of the lessors' title or any evidence of title prior to the lease under which the Defendant held the premises, and would make no objection should the lease be an underlease or the premises demised form part of larger property demised by any superior or other lease, and would enter upon and take possession of the premises on or before the 15th day of April.

There were clauses in reference to the payment of the £750; and the valuation of and taking to the stock of wines and spirits and other consumables, and the fixtures. And then it was further agreed that if either party should refuse or neglect to perform his part of the agreement, he should pay to the other of them on demand the sum of £200 as damages, "and in case of default" by the Plaintiff "the deposit money to be forfeited in part of such damages."

The Plaintiff, on the 19th of March, paid to the Defendant's agent, an auctioneer, the deposit money of £100.

On the 29th of March, 1878, the Plaintiff's solicitors received from the Defendant's solicitor an abstract of title to the premises, and it therein appeared that the Defendant had not a term of which at least twelve and a half years from Lady Day, 1878, were unexpired, but that he held the public-house and premises under an indenture of lease dated the 24th of March, 1870, for a term of twenty-one years from Christmas Day, 1869, determinable at the option of the lessors or lessee upon giving six months' notice before the expiration of the first seven or fourteen years of the term; and further, there was a proviso that if the lessors should require any portion of the premises for building purposes the lessee should yield up such portion upon being compensated for the same; therefore it was alleged that the lease was determinable at the will of the lessors on Christmas Day, 1883, and also upon certain terms at any time, should they require the whole or any part of the premises for building purposes.

V.-C. H. 1879 WESTON v. SAVAGE. Statement.

Upon the receipt of the abstract of title the Plaintiff required the Defendant to return his deposit money of £100, but he refused to do so, and consequently this action was commenced, the writ being issued on the 10th of April, 1878, for an order for the repayment of the money with interest at £5 per cent. from the day of payment, and for a declaration that the agreement was void and ought to be delivered up to be cancelled, and for costs of the action.

Upon the 2nd of July, 1878, the Defendant filed his statement of defence, and he therein denied the alleged representation on his part. He stated that he placed in the hands of his agent the lease of the premises for the purpose of sale; that the Plaintiff, having previously visited and examined the premises, by appointment met him at the house of the Plaintiff's agent, a broker and general agent, on the 15th of March; and that a negotiation was then gone into, and "it being then stated that twelve and a half years were" (as they in fact were) "unexpired of the original term of twenty-one years for which the lease was granted" (but no representation as to the terms or conditions of the lease being made), it was then agreed between the parties that the agreement which was to be signed should not be binding on either party until the Plaintiff or his agent should see or examine the lease.

The original lease and the assignments [there had been three assignments between the date of the lease in 1870 and March, 1878] were, on the 16th of March, left with the Defendant's agent, the auctioneer, and the Plaintiff's agent afterwards called at his office and read over the lease and the assignments, and the contents were discussed by them. The auctioneer then handed to the Plaintiff's agent all the documents for him to peruse on behalf of the Plaintiff, and on the 18th of March, 1878, he having perused them and informed the Plaintiff of their contents, returned the contract to the auctioneer signed by the Plaintiff, and paid the deposit money of £100 into his hands, and he still held the same.

There was an allegation that the attention of the Plaintiff's agent was directed to the clauses giving an option to the lessors to determine the lease, and that the Plaintiff was, by his agent or

otherwise, fully aware, when he entered into the contract, of the terms and effect of them and of all the conditions of the lease. And the Defendant also set forth in his statement of defence that he had a term of which twelve and a half years were unexpired, and in any case he "could and would if necessary before the time limited for completion, have procured the lessors or their representatives to waive or release the options under which the lease might be determined if required by the Plaintiff so to do," and that he at the time when the Plaintiff repudiated the contract was ready and willing to perform it, and he submitted that the Plaintiff was not entitled to avoid it, and that having made default he was not entitled to require the deposit money to be returned. The Defendant, by way of set-off, relied upon the fact that the Plaintiff improperly refused to perform the contract, and he claimed the £100 as forfeited in part payment of the £200 agreed upon as damages. There was a short correspondence between the solicitors, in the expectation that the contract could be rescinded upon terms, and further litigation prevented, but as the payment of the costs which had been incurred could not be agreed upon that result was not arrived at; and the Defendant insisted that the Plaintiff must perform his contract.

Statement.

*Dickinson*, Q.C., and *Heath*, for the Plaintiff:—

Argument.

This being the sale of a public-house as a going concern, time is of the essence of the contract: *Day* v. *Luhke* (1); *Cowles* v. *Gale* (2).

The Defendant contracted to assign a term certain. He could not perform his contract, and it is sufficient to say that, "where a person sells an interest, and it appears that the interest which he pretended to sell was not the true one, as, for example, if it was for a less number of years than he contracted to sell, the purchaser may consider the contract at an end and bring an action . . . to recover any sum of money paid in part performance of the agreement for sale" (3).

Even if the Defendant, when the title was objected to, could obtain a release or waiver of the lessors' options, unless he could

(1) Law Rep. 5 Eq. 336. (2) Law Rep. 7 Ch. 12.
(3) Sug. V. & P. 13th Ed. ch. 8, sect. 1, p. 247.

V.-C. H. 1879 WESTON v. SAVAGE. Argument.

do so before the 15th of April it would not avail. The course taken by the Plaintiff in putting an end to the contract was not precipitate, as the determination to do so must be immediate on the discovery of the blot in the title. To rescind at once, therefore, was the Plaintiff's duty, and it would have been fatal to him if he had entered upon a negotiation: *Van* v. *Corpe* (1); *Casson* v. *Roberts* (2); *Forrer* v. *Nash* (3); *Hochster* v. *De la Tour* (4).

The documents which the Defendant sent for inspection in proof of his title shewed that he could not assign the term contracted for at the time fixed, still he insisted that the Plaintiff should perform his contract on the ground that he or his agent, having seen the documents before he signed the contract, had previous knowledge, and was bound to take what he could get without making any objection. It should be observed that under no circumstances could either the Defendant or the Plaintiff have commenced proceedings to compel the specific performance of the contract, because it was known that the Defendant could not give a twelve and a half years' lease, and that the Plaintiff could not obtain it. The contract being such as described, the Plaintiff is entitled to the relief asked for.

*Vaughan Hawkins*, for the Defendant:—

I submit that upon the pleadings and facts the Plaintiff had no right to bring this action. There was not such a misdescription in the contract as entitled the Plaintiff to say the contract was void, and to demand the return of his money. Because the Defendant had not, at the moment when the contract was signed, obtained a release of the lessors' option, the Plaintiff determined to rescind. If the option had been released the contract would have been good, and the Defendant alleges that he could and would, before the 15th of April, have procured that release, but five days before the time for the completion arrived the Plaintiff issued his writ in this action. The Defendant could have made a satisfactory title at the time fixed. The Plaintiff, however, would not wait, but insisted that the contract was void on the ground of misdescription. The Plaintiff having made default in

(1) 3 My. & K. 269, 277.
(2) 31 Beav. 613.
(3) 35 Beav. 167.
(4) 2 E. & B. 678.

the performance of the contract, the forfeiture of his deposit money takes effect, and he must also pay damages.

[The cases of *Morley* v. *Clavering* (1), *Halsey* v. *Grant* (2), *Hinton* v. *Sparkes* (3), and *Leake's* Digest of the Law of Contracts (4), were referred to.]

Judgment.

HALL, V.C. :—

It appears to me that the Plaintiff is entitled to the judgment of the Court for the return of his £100, with interest at £5 per cent. from the 19th of March, 1878. The first time the Defendant gave any instructions whatever that he could and would get rid of the lessors' option was in his statement of defence; and I am not prepared to say that if this had been an action at law prior to the *Judicature Act*, that such an allegation would have enabled this Court to restrain it, because this is a case of the sale and purchase of a public-house and the good will of it, and the stock of wines and spirits on the premises to be taken at a valuation. It was, in fact, the sale and purchase of a going concern, and time was of the essence of the contract. The completion of the contract was fixed for the 15th of April, and the writ in this action was issued on the 10th of April, but looking at the case from a common law point of view, and having regard to the pleadings, I consider that the Plaintiff was absolved from waiting till the 15th of April before issuing the writ. To suppose that the Defendant is, under the circumstances, to put the £100 in his pocket and to keep it, is entirely out of the question. In reference to the argument that the Plaintiff was somewhat hasty in issuing his writ, it may be observed that, though the contract was signed on the 18th of March, the Defendant's solicitor did not deliver an abstract of title till the 29th of March, leaving, therefore, a very short time for its examination before the day fixed for completion. The Defendant insisted that he had a sufficient lease, and required the Plaintiff to take what he could get; but it cannot be considered that a contract which stipulates for a twelve and a half years' term will be satisfied by giving an assignment of what, if

(1) 29 Beav. 84. 7 Jur. N.S. 904
(2) 13 Ves. 73.
(3) Law Rep. 3 C. P. 161.
(4) Page 107.

V.-C. H. 1879 WESTON v. SAVAGE.

the lessors exercise their option, will be only five years. I am of opinion that the Plaintiff was not bound to accept what was offered to him, and therefore I hold that he must be repaid the deposit money, with interest and costs, including the costs of any witnesses who have attended in Court.

Solicitors: *Hawks, Willmott, & Stokes; William Philp.*

## CHAMBERS *v.* KINGHAM.

FRY, J.
1878
Nov. 15, 16, 23.

[1877 C. 251.]

*Merger in Equity—Term—Administrator—Assignment—Action.*

*C.*, an administrator granted an underlease for a term of years of land held by him as administrator. Shortly afterwards the underlessee assigned the land to *C.* for the residue of the term:—

*Held*, that there was in equity no merger of the term, and that Plaintiffs who would be entitled to the land if the term was in existence could maintain an action to establish their title to the land for the term, and for mesne profits.

Statement.

By an indenture of lease dated the 3rd of January, 1816, a part of *Chelsea Park* was demised to *Robert Chambers*, the father, for the term of ninety-nine years from the 29th of September, 1815. *Robert Chambers*, the father, died in 1840, and administration to his estate and effects was granted to *Robert Chambers*, the son.

By an indenture of underlease dated the 17th of June, 1841, and made between *Robert Chambers*, the son (described as *Robert Chambers*, Esq., administrator of the goods and chattels, rights and credits, of *Robert Chambers*, his late father, deceased), of the one part, and *J. R. Pavey* of the other part, after reciting the above-mentioned lease, it was witnessed that *R. Chambers* demised and leased unto *J. R. Pavey* a piece of ground, being part of the land comprised in the said indenture of lease, from the 24th day of June then instant for and during the full term of seventy-three years and one quarter, wanting ten days, at the annual rent of £8. The covenants in the lease were with and by *Robert Chambers*, his executors, administrators, and assigns.

By an indenture dated the 3rd of July, 1841, and made between *J. R. Pavey* of the one part, and *R. Chambers* of the other part, for a nominal consideration, *J. R. Pavey* assigned all the piece of ground comprised in the said underlease unto *R. Chambers*, his executors, administrators, and assigns, for all the residue of the said term of seventy-three years and one quarter, wanting ten days, subject to the rents and covenants contained in the underlease;

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and the assignment contained covenants by *R. Chambers* for the indemnity of *J. R. Pavey*, as usual in the assignment of a lease.

It appeared that the underlease of June, 1841, had always been treated as subsisting, and that the rent of £8 had been paid accordingly.

The Plaintiffs, resting their title on the underlease of June, 1841, as subsisting, brought this action, claiming to establish their title to a part of the land comprised in the underlease, and claiming mesne profits, costs, and further relief.

One of the questions argued was, whether the underlease of the 17th of June, 1841, was subsisting, or had been merged by the assignment of the 3rd of July, 1841.

Argument.

*Serrell*, and *Mackreth*, for the Plaintiffs:—

The Plaintiffs deduce their title as beneficially entitled under the will of *Robert Chambers*, the son, in whom the lease of June, 1841, was vested by the assignment of July, 1841. It will be said that the lease was merged, but that is not so, as *R. Chambers*, the son, took the assignment in his own right, and not as administrator.

[FRY, J., referred to *Thorn* v. *Newman* (1) as an authority against merger.]

The subsequent dealings with the property shew that to have been the case.

*Cookson*, Q.C., and *Cracknall*, for the principal Defendants:—

The lease of June, 1841, became merged in the reversion by the subsequent assignment. The administration was not at an end, and an administrator cannot take any part of the estate for his own benefit. At all events, there was merger at law.

[FRY, J.:—Assuming that to be so, is not the merged estate subsisting in equity, and is not that enough for the Plaintiffs?]

Not in an action like this, which is in the nature of an ejectment.

*North*, Q.C., and *G. S. Law*, for other Defendants.

(1) 3 Sw. 603.

*Serrell*, in reply as to merger, cited *Steph.* Comm. (1); *Gage* v. *Acton* (2); *Lichden* v. *Winsmore* (3).

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Nov. 23. FRY, J., after stating the facts of the case, continued:— Judgment.

The question, therefore, comes to be this: whether the lease of June, 1841, has been extinguished; because if that lease is still subsisting, it is evident that the right to the possession of the property is under that and not under a subsequent lease which would operate on the reversion. The question, therefore, is whether there has been any merger of the lease of June, 1841. It has been suggested by the Defendants that such a merger has taken place, and the ground of this is, that by the deed of July, 1841, that lease became vested in *Robert Chambers*, the son, who was entitled, as administrator to his father, to the reversion. Is there, then, a merger under these circumstances? Now it appears to me that there is no authority for holding that there is any such merger in equity. I take the general rule to be, that where one of the interests is held *en autre droit*, no merger takes place; and I find in Mr. Justice *Williams*' work on Executors (4) this statement: "And it should seem that in no case would the term held by an executor or administrator merge in equity; for mergers are odious in equity and never allowed unless for special reasons." I must make this further observation. I am bound to assume that the lease of June, 1841, was well granted, and was for the benefit of the estate of which *Robert Chambers*, the son, was administrator; and if so, the extinction of that term, and with it the extinction of the right to the rent and to the performance of the covenants which were incident to that term, would be an injury to the estate, as it would deprive the estate of the benefit which it was to derive from the lease. Of course, if there were any circumstances which shewed that the lease of June, 1841, had been improperly created, or that the assignment of July, 1841, had been improperly taken by the administrator, a right would arise to the persons interested

(1) 7th Ed. vol. i. p. 378.
(2) 1 Salk. 325.
(3) 1 Roll. Abr. 934, pl. 20.
(4) Wms. Exors. 6th Ed. p. 608.

FRY, J.
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Judgment.

in the estate to set the transaction aside or to claim the benefit of the lease in which *Robert Chambers*, the son, had become interested. If, I say, those circumstances had existed, he might have been constituted a constructive trustee; but no circumstances of that sort are shewn to exist, and I am bound to assume that the lease of June, 1841, was for the benefit of the estate, and that the assignment would not and did not create any trust in *Robert Chambers*, the son.

I have not adverted to the legal question (which does not appear to me to be so material to consider), whether under such circumstances a merger would take place at law. It appears to me that, in the absence of such special circumstances as are not shewn to exist here, a term held by a person in his own right does not merge in the reversion held by the same person as an administrator.

[His Lordship then decided against the Defendants on other questions raised by them, and made a declaration that the Plaintiffs were entitled to the possession of the hereditaments comprised in the lease of June, 1841, for the term of seventy-three and a quarter years, less ten days, from the 24th of June, 1841, subject to the payment of the rent of £8 a year, and to the performance of the covenants under that lease, and directed an inquiry as to the mesne profits which had accrued from the beginning of the action.]

Solicitors: *G. Serrell*, Sen.; *P. J. Gordon; Law, Hussey, & Hulbert.*

## EVANS *v.* DAVIS.

FRY, J.

1878

Nov. 22, 23, 25.

[1878 E. 40.]

*Lease—Proviso for Re-entry—Breach of Negative Covenant—Executory Agreement—Pleading—Claim for inconsistent Relief—Waiver of one Alternative—Custom—Evidence—Costs—Restrictive Covenant—Construction—"Outward mark or show of Business."*

An agreement by *E.* to grant a lease to *D.* provided that "in case of non-performance" of any of the agreements on the part of the tenant, it should be lawful for the landlord to re-enter.

*Semble*, that the proviso did not apply to the breach of a negative agreement.

The agreement also provided that the lease to be granted should contain certain specified covenants, and all such other covenants and conditions as were contained in the lease under which *E.* held the property, with such additions as might be necessary and proper in an underlease. The lease to *E.* contained a proviso for re-entry by his lessor in case the lessee should not "observe, perform, and keep" the covenants:—

*Held*, that the underlease to be granted in pursuance of *E.'s* agreement with *D.* ought to contain a similar proviso, that the agreement being executory must be read as if it had contained such a proviso, and that such a proviso would extend to the breach of a negative covenant.

The lease to *E.* contained a covenant by the lessee not "to affix or permit any outward mark or show of business to be affixed" on the demised premises. *D.* granted a lease to *B.* of two of the rooms comprised in the agreement, and the right to use the entrance in common with the other occupiers of the house. *B.* carried on the business of a tailor under the firm of *H. B. & Co.* She put up in the window of one of the rooms a wire blind which had inscribed on the side of it towards the street, "*H. B. & Co.*, late *S., B., & Co.*," and also a white roller blind with the inscription on it, "*H. B. & Co.*" She also placed on the iron railings outside the entrance a brass plate with the inscription, "*H. B. & Co.*, late *S., B., & Co.*, tailors":—

*Held*, that both the blinds and the brass plate constituted an "outward mark or show of business" within the meaning of the covenant, and that *D.* was entitled to re-enter under the proviso in the agreement.

*E.* commenced an action against *D.* and *B.* in respect of the breach. No lease had at this time been executed in pursuance of the agreement. The writ was indorsed with a claim for an injunction to restrain the Defendants from committing a breach of the agreement; damages for the breach; and to recover possession of the premises comprised in the agreement. By his statement of claim the Plaintiff said that the lease had not been granted to *D.*, "but the Plaintiff has always been and is ready and willing to grant the same":—

*Held*, that the claim to an injunction, being founded on the continuance

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of the agreement, was inconsistent with the claim to recover possession, and that the Plaintiff must be taken to have waived the latter claim by stating that he was ready and willing to grant the lease:

But, *held*, that an injunction must be granted to restrain *B.* from breaking the covenant, and that the injunction must extend to *D.*, because he had not parted with the possession of the entrance, and had sanctioned the putting up of the blinds.

*Clements* v. *Welles* (1) distinguished.

But judgment was given for the Plaintiff without costs, on the ground that by his pleadings he had placed the Defendants in great difficulty.

It was alleged that by the custom of the estate of which the house formed part the words used in the restrictive covenant had acquired a particular meaning, and it was proposed to prove the custom by producing the counterpart of a lease granted by the owners of the estate to a person not a party to the action:—

*Held*, that this was not admissible evidence.

Statement.

ON the 18th of August, 1876, the Plaintiff, *Rees Evans*, was the occupier of a house No. 15 *Clifford Street* and No. 1 *Cork Street*, in the parish of *St. James's, Westminster*. He had held it as the assignee of a lease for a term of years. The term had, however, expired, but the Plaintiff had agreed with his lessors for a renewed lease of the premises. The premises formed part of an estate known as the "*Pollen* estate," the leases of which were granted by trustees.

On the 18th of August, 1876, an agreement in writing was entered into between the Plaintiff of the one part and the Defendant *E. F. Davis* of the other part, whereby it was mutually agreed that when and so soon as a certain intended new additional room should be built and completed, and the Plaintiff should have himself obtained a lease from the trustees of the *Pollen* estate, and upon *Davis* performing the agreements on his part thereinafter contained, the Plaintiff should grant to *Davis* and *Davis* should accept a lease of three rooms on the ground floor of the house No. 15 *Clifford Street* and No. 1 *Cork Street*, then in the occupation of *Davis*, and the additional room when the same should be built, together with the separate entrance in *Clifford Street*, and full and free liberty of passing and re-passing at all times to and from the premises, to hold the same for ten years from the 25th of March, 1876, at the yearly rent of £250. The

(1) Law Rep. 1 Eq. 200.

lease was to contain covenants on the part of the tenant as follows:—

"Not to assign, underlet, or part with the possession of the said premises or any part thereof without the consent in writing of the landlord, his executors or administrators, but such consent is not to be withheld provided the landlord is able to obtain the consent of the superior landlord, and provided the proposed assignees, underlessees, or under-tenants are respectable and responsible persons. In case the landlord shall refuse his consent to such assigning or underletting, the tenant shall have the option at any time, on giving three months' previous notice, to determine the term hereby created. Not to do or permit to be done upon the said premises any act or thing which may be in contravention of any of the terms upon which the said premises are held, being the covenants and agreements on the lessee's part contained in a certain lease granted by the trustees of the *Pollen* estate to *C. G. Cooper*, dated the 20th of June, 1851, which has expired and not yet been renewed; not to do or permit to be done any act or thing which may be a nuisance or annoyance to the neighbourhood where the said premises are situate, or to the annoyance, damage, or disturbance of the landlord or of the occupiers of the remaining portions of the premises No. 15 *Clifford Street* or No. 1 *Cork Street;* and all such other covenants and conditions as shall be contained in the lease about to be granted to the landlord by the trustees of the *Pollen* estate, with such additions as may be necessary and proper in an underlease. That until the said additional room shall be built and completed, and the said new lease and counterpart shall be executed, the tenant shall hold the said existing three rooms on the ground floor, and also the small room at the corner of *Cork Street* used as a lobby, as yearly tenant, but in all other respects upon the same terms and subject to the same covenants and conditions as are hereinbefore expressed and intended to be contained in the said lease hereby agreed to be granted, with the exception that until the said new room shall be completed the rent shall be £200 a year only. And the landlord shall have the same right to distrain for the several rents for the time being payable for the same premises as if such lease and counterpart had been executed, and in

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case of non-payment of the said rent, although no formal or legal demand shall be made, or of non-performance of any of the agreements herein contained on the part of the tenant, it shall be lawful for the landlord to re-enter the said premises and to eject all tenants and occupiers as if these presents had not been made, and a similar provision shall be inserted in the lease to be granted."

After the date of this agreement the Plaintiff built the additional room therein referred to. The renewed lease of the house was granted by the *Pollen* trustees to the Plaintiff by an indenture dated the 30th of May, 1877, for a term of twenty-one years from the 25th of March, 1877. This lease contained, as did the former lease from the *Pollen* trustees to the Plaintiff, (*inter alia*) a covenant that the lessee, his executors, administrators, or assigns, should not use, exercise, or carry on, or suffer to be used, exercised, or carried on, in or upon the premises, certain trades therein mentioned, "or any other open, noisy, or offensive trade or business whatever, or convert the same into a shop, or affix or permit any outward mark or show of business to be affixed thereon." And the renewed lease contained a proviso for re-entry by the trustees in case the rent thereby reserved should be in arrear for twenty-one days, "or if the lessee, his executors, administrators, or assigns, shall not well and truly observe, perform, and keep all and every the covenants and agreements hereinbefore contained." The Defendant *Davis* entered into the occupation of the three rooms and the additional room under the agreement, but the underlease to him had not been executed when this action was commenced in April, 1878. On the 20th of December, 1877, the Defendant executed a lease to *Elizabeth Browne*, widow, of two of the rooms comprised in the agreement of the 18th of August, 1876, together with the use, with the other tenants and occupiers of the premises No. 15 *Clifford Street*, of the separate entrance in *Clifford Street*. "And together also with liberty for the lessee, so far as the lessor is able to give the same, of placing a movable brass plate on the outside railings of the said premises, the style and position of such plate to be approved of by the lessor, his executors, administrators, or assigns."

The Defendant *Elizabeth Browne* carried on the business of a

tailor, under the style of *H. Browne & Co.* After she entered into possession of the two rooms, she put up in the window of one of the two rooms, which looked upon *Cork Street*, a wire blind with this inscription upon it, "*H. Browne & Co.*, late *Storey, Browne, & Co.* Entrance 15, *Clifford Street.*" She also put up inside the same window a white roller blind, which was drawn down in the evening, with this inscription on it, "*H. Browne & Co.*, 15, *Clifford Street.*" And she put up upon the railings, at the entrance in *Clifford Street*, a brass plate with this inscription on it, "*H. Browne & Co.*, late *Storey, Browne, & Co.*, Tailors, from 157, *New Bond Street.*" On the 20th of February, 1878, the Plaintiff gave a formal notice to the Defendant *Elizabeth Browne* to remove the blinds and the brass plate; and on the 9th of April, 1878, the writ in this action was issued. It was indorsed with a claim for an injunction to restrain the Defendants from carrying on or permitting to be carried on at the premises comprised in the agreement of the 18th of August, 1876, any open trade or business, or affixing or permitting to be affixed on the premises any outward mark or show of business, or otherwise committing any breach of the agreement; and for damages for breach of the agreement, and to recover possession from the Defendants of such parts of the messuage No. 15 *Clifford Street* and No. 1 *Cork Street* as were occupied by them, or either of them, pursuant to the agreement.

The Plaintiff's statement of claim delivered on the 30th of April, 1878, alleged that the Defendant *Elizabeth Browne* had put up the blinds and the brass plate with the license and consent of the Defendant *Davis*, and that the Defendants had thus committed a breach of the agreement of the 18th of August, 1876. Paragraph 12 was as follows:—

"The lease agreed to be granted by the said agreement to the Defendant *Davis* as aforesaid has not yet been granted, but the Plaintiff has always been and is ready and willing to grant the same, and the draft thereof has been approved by the Defendant *Davis* or on his behalf, and such draft contains a covenant as to carrying on or making a show of business on the said premises, in all respects similar to the covenant in that behalf in the lease to the Plaintiff from the *Pollen* trustees."

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And it was alleged (paragraph 13), "The said premises were underlet by the Defendant *Davis* to the Defendant *Elizabeth Browne* without the license of the Plaintiff, and the Plaintiff is entitled to damages in this respect for breach of the agreement." Not a word was said about recovering possession of the premises until the Plaintiff came to state what relief he claimed. His claim was (1.) An injunction in the terms mentioned in the indorsement on the writ. (2.) Damages for the breaches of agreement. (3.) To recover possession of the premises from the Defendants.

The Defendant *Davis* by his statement of defence denied that the brass plate had been put up with his license or consent, but said that he did not admit that the same constituted a breach of the covenants in the Plaintiff's lease. He denied that the use of the blinds constituted a breach of any of the covenants; but he did not deny that the blinds had been put up with his consent. He also said that the Plaintiff had acquiesced, and had waived his right to object to the alleged breaches. The Defendant denied that the premises were underlet by him to the Defendant *Elizabeth Browne* without the license of the Plaintiff. No written license was obtained, but the Plaintiff acquiesced in the granting of such underlease without such written license, and he had since waived the alleged breach. And, if any breach had been committed, the Defendant denied that the Plaintiff had suffered any damage by the same.

The Defendant *Elizabeth Browne* by her statement of defence denied that she had committed any breach of the covenants contained in the Plaintiff's lease, or of the agreement of the 18th of August, 1876, and she alleged acquiescence on the part of the Plaintiff. And she said that the brass plate and blinds had been put with the license and consent, or at least without the dissent, of the Defendant *Davis*.

This was the trial of the action.

Argument.

*North*, Q.C., and *E. Ford*, for the Plaintiff:—

There has been a clear breach of the covenant not to permit any outward mark or show of business to be affixed to the premises, both by the blinds and the brass plate. The Plaintiff is exposed

to a forfeiture of his own lease. He is entitled to recover possession by reason of the breaches.

[FRY, J., referred to *Doe* v. *Marchetti* (1) as shewing that a proviso for re-entry on non-performance of the covenants in a lease does not apply to a negative covenant.]

That case does not apply. There has been no waiver of the covenant by the Plaintiff, nor any delay which can deprive him of his right, the Court being asked to enforce a legal right: *Fullwood* v. *Fullwood* (2). There being a breach of an agreement, it is not necessary to shew damage: *Dickinson* v. *Grand Junction Canal Company* (3). An underlessee, and even a yearly tenant, has constructive notice of all the covenants contained in the original lease: *Wilson* v. *Hart* (4); *Clements* v. *Welles* (5). It is assumed that he has either investigated his lessor's title, or has wilfully abstained from doing so. *Davis* has allowed Mrs. *Browne*, his undertenant, to break the covenant, and therefore he is liable for her acts. A parol license to underlet is not sufficient, and receipt of rent without knowledge of the forfeiture does not amount to a waiver: *Roe* v. *Harrison* (6); *Richardson* v. *Evans* (7); *Woodfall's* Landlord and Tenant (8).

*Cookson*, Q.C., and *Northmore Lawrence*, for the Defendant *Davis*:—

The case has been opened as an action to recover possession of the property; the injunction has been in effect abandoned. The doctrine of *Tipping* v. *Eckersley* (9) has not been invoked. The authorities shew that a proviso for re-entry, worded as the clause in this agreement is, gives no right of re-entry on the breach of a negative covenant: *Doe* v. *Marchetti*. "A negative cannot be performed": *Co. Litt.* (10); *Doe* v. *Stevens* (11); *West* v. *Dobb* (12).

(1) 1 B. & Ad. 715.
(2) 9 Ch. D. 176.
(3) 7 Ex. 282.
(4) 2 H. & M. 551; Law Rep. 1 Ch. 463. 11 Jur. N.S. 735.
(5) Law Rep. 1 Eq. 200.
(6) 2 T. R. 425.
(7) 3 Madd. 218.
(8) 11th Ed. pp. 294, 295.
(9) 2 K. & J. 264.
(10) 303 b.
(11) 3 B. & Ad. 299.
(12) Law Rep. 4 Q. B. 634; Ibid. 5 Q. B. 460.

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[FRY, J., referred to *Williams' Saunders* (1), where it is said "A negative covenant is not said to be performed until it becomes impossible to break it."]

In *Hyde* v. *Warden* (2) the Court of Appeal was prepared to hold that a power of re-entry, being only in the event of the lessee "wilfully failing or neglecting to perform any of the covenants," did not apply to a breach of a negative covenant. In the present case there are affirmative as well as negative covenants. In *Doe* v. *Watt* (3) the question was whether the lease created a condition. But, even if the Plaintiff was originally entitled to recover possession by reason of the breach, he has waived the forfeiture by his pleadings. He asks for an injunction and damages as for a continuing breach, and he can only be entitled to this on the footing of the agreement being still subsisting. This is inconsistent with a right to recover possession which is founded on the determination of the agreement. And then, by paragraph 12 of the statement of claim, the Plaintiff has expressed his readiness to execute a lease in pursuance of the agreement. That amounts to a waiver of the forfeiture.

[FRY, J.:—A Plaintiff may draw two inconsistent inferences from the same state of facts: *Rawlings* v. *Lambert* (4).]

That doctrine has never been applied to an ejectment action.

[FRY, J.:—That distinction is now swept away.]

At any rate, here there is a conclusive waiver of the forfeiture by the pleadings. *Jones* v. *Carter* (5) does not apply. And the right to an injunction has been waived because the Plaintiff's counsel did not insist upon it in their opening; they insisted only on the right to recover possession.

[FRY, J.:—I told Mr. *Cookson* when he opened his case that he must be prepared to meet the question of injunction. I do not think there has been any waiver of the injunction.]

There has been no breach of the covenant not to underlet without the written consent of the landlord, for the agreement goes on

(1) Vol. ii., 156 c.
(2) 3 Ex. D. 72, 82.
(3) 8 B. & C. 308.
(4) 1 J. & H. 458.
(5) 15 M. & W. 718.

to say that the consent is not to be withheld "provided the landlord is able to obtain the consent of the superior landlord, and provided the proposed underlessees are respectable and responsible persons." It is not contended that Mrs. *Browne* is not a respectable and responsible person, and the circumstance that the consent was not asked for is immaterial, because the landlord could not lawfully have withheld it; and if he did under such circumstances withhold it, he could not eject the Defendants: *Hyde* v. *Warden* (1); *Treloar* v. *Bigge* (2).

[FRY, J.:—In *Hyde* v. *Warden* there had been some communications between the lessor and the lessee.]

*Richardson* v. *Evans* (3) shews that a Court of Equity would hold a parol license sufficient where the conduct of the lessor had been such as to render it inequitable that he should rely upon the absence of a written one. As far as the injunction is concerned, the Defendant *Davis* ought not to have been made a party to the action, and he is entitled to judgment in his favour. He has no control over Mrs. *Browne;* he has parted with his interest and is in no way to blame: *Feilden* v. *Slater* (4); *Clements* v. *Welles* (5); *Parker* v. *Whyte* (6). Restrictive covenants of this nature are to be construed very strictly: *Harms* v. *Parsons* (7); *Pease* v. *Coats* (8).

[FRY, J., referred to *Bowes* v. *Law* (9).]

*Davis* is not responsible for the brass plate; he has not permitted it to be affixed. The blinds are not breaches of the covenant; they are not an "outward" mark or show of business; they are inside the premises. The evidence shews acquiescence on the part of the Plaintiff.

[FRY, J.:—It is not alleged that the consent of the superior landlord has been obtained for the underletting.]

The Plaintiff ought to prove that it has not.

[FRY, J.:—I think the burden is on you to prove affirmatively

(1) 3 Ex. D. 72, 82.
(2) Law Rep. 9 Ex. 151.
(3) 3 Madd. 218.
(4) Law Rep. 7 Eq. 523.
(5) Law Rep. 1 Eq. 200. 35 Beav 573,
(6) 1 H. & M. 167.
(7) 32 Beav. 328. 9 Jur NS 145
(8) Law Rep. 2 Eq. 688. 12 Jur NS 684
(9) Law Rep. 9 Eq. 636.

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that the circumstances exist under which the Plaintiff is bound not to withhold his consent.]

In the course of the examination of the Defendants' witnesses, it was attempted to prove that there existed a custom on the *Pollen* estate by virtue of which the words used in the restrictive covenant had acquired a particular meaning which would render the blinds and brass plate complained of not a breach of the covenant, and to prove the existence of the alleged custom it was proposed to put in the counterparts of leases granted by the *Pollen* trustees to other tenants on the estate.

*North*, Q.C., objected to this evidence.

FRY, J., held that the evidence was inadmissible, and said that he could not look at the dealings of the *Pollen* trustees as such. The custom should be proved by witnesses who could depose to the way in which the particular words used in the covenant were understood in the district.

*W. W. Karslake*, for the Defendant *Browne*:—

The Plaintiff has by his conduct waived his rights. The doctrine of *Pickard* v. *Sears* (1) applies. As to the construction of the covenant, the word "outward" is defined by Dr. *Johnson* as meaning "materially external." The blinds do not come within the word, and moreover they are not "affixed"; they are moveable. Neither they nor the brass plate are a "mark or show" of business; that refers to something like a display of goods in the window. The word "show" cuts down the meaning of "mark." Again, the brass plate is not on the demised premises at all; it is placed on the railings outside the house.

[FRY, J.:—If it is a mere trespass, still cannot the Court now interfere by injunction under sect. 25, sub-sect. 8, of the *Judicature Act*, 1873?]

Looking at all the circumstances, no injunction ought to be granted, and a farthing damages is all that the Plaintiff is entitled to.

(1) 6 A. & E. 469.

*North*, in reply:—

As a matter of common sense, apart from any legal refinement, any one would say that if a man has covenanted not to affix a mark and he does affix a mark, that is a non-performance of his covenant.

[FRY, J.:—In almost every lease the proviso for re-entry is expressed to be in the event of the "non-performance or non-observance" of any of the covenants. I have always understood that "non-observance" refers to the negative covenants, and "non-performance" to the affirmative covenants.]

The cases relied upon are all distinguishable. *Doe* v. *Marchetti* (1) proceeded entirely upon the special words "make default in performance by the space of thirty days after notice," which it was held could not apply to a negative covenant. In *Doe* v. *Stevens* (2) the words were "do or cause to be done any act in breach of any of the covenants." *West* v. *Dobb* (3) was quite distinct from the present case. In *Hyde* v. *Warden* (4) the words were "wilfully fail or neglect to perform any of the covenants," and the passage in the judgment (5), which is relied on for the Defendants, amounts only to a *dictum*. *Croft* v. *Lumley* (6) illustrates the principle.

But this is an executory agreement, and the lease to be executed in pursuance of it would properly have contained a proviso for re-entry in terms corresponding to those in the lease by the *Pollen* trustees to the Plaintiff, in which the words are "observe, perform, and keep." The agreement must be construed as if a proper lease had been executed.

On the construction of the covenant, there has been a clear breach both by the blinds and the brass plate. The words on the blinds are an "outward" show of business, and the plate is clearly "outward."

With regard to the underletting without consent, there is no evidence that the consent of the superior landlord has been ob-

(1) 1 B. & Ad. 715.
(2) 3 B. & Ad. 299.
(3) Law Rep. 4 Q. B. 634; Ibid. 5 Q. B. 460.
(4) 3 Ex. D. 72.
(5) Ibid. 82.
(6) 5 E. & B. 648, 682; 6 H. L. C. 672.

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tained. *Hyde* v. *Warden* (1) is not really an authority that the lessee may assign without consent if the circumstances are such that the lessor is not entitled to refuse his consent, for there the lessor had in an informal way accepted the proposed underlessee.

[FRY, J., referred to *Lehmann* v. *McArthur* (2); *Robinson* v. *Chartered Bank* (3).]

But here the agreement gives the tenant the option, in the event of the landlord refusing his consent, of throwing up the lease; that is his remedy and his only one. *Hyde* v. *Warden* does not apply.

The Plaintiff has not waived his right in any way. Paragraph 12 of the statement of claim cannot be treated as a waiver, for there is an express claim to recover possession both in the writ and in the statement of claim.

[FRY, J.:—Is not an injunction to restrain a breach of the agreement inconsistent with the recovery of possession?]

The injunction may be granted for the period which may elapse until possession is actually recovered. In *Toleman* v. *Portbury* (4) it was held that a forfeiture was not waived by the Plaintiff in an action for ejectment giving as particulars, under an order for particulars of breaches, the permitting a sale by auction on the demised premises contrary to the Defendant's covenant, and also non-payment of rent accrued due after the forfeiture. *Grimwood* v. *Moss* (5) is a somewhat similar case.

[FRY, J.:—Is not paragraph 12 a submission to perform the agreement? In *Bagnall* v. *Carlton* (6) the Court of Appeal held that the Plaintiffs could not retract an offer made by their bill.]

The Court did not hold the Plaintiffs bound by their offer, but only declined to grant the Plaintiffs relief except on the terms of their offer. The issuing of a writ is not a conclusive election; the Plaintiff can withdraw it at any time. At the most it may be said that the Plaintiff cannot have an injunction as well as possession, but he might require the injunction for the interval of time up to the judgment for possession. And, if he has made an offer

(1) 3 Ex. D. 72, 81.
(2) Law Rep. 3 Ch. 496.
(3) Ibid. 1 Eq. 32.
(4) Law Rep. 6 Q. B. 245; Ibid. 7 Q. B. 344.
(5) Law Rep. 7 C. P. 360.
(6) 6 Ch. D. 371.

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to perform the agreement, the Defendants have never accepted it, but have put him at arm's length.

But, if the Plaintiff cannot recover possession, he is entitled to an injunction, and it ought to extend to *Davis* as well as to *Browne*. *Davis* has given a license to *Browne* to put up the brass plate.

[FRY, J.:—Only as far as he lawfully can.]

He has let Mrs. *Browne* into possession. She is his licensee, and he is responsible for her acts: *White* v. *Jameson* (1).

[FRY, J.:—That case related to torts committed on the property.]

*Davis* admits that he approved of the blinds. Moreover, he has not parted with his whole interest in the property, as the lessee had done in *Clements* v. *Welles* (2) and in *Feilden* v. *Slater* (3); on the contrary, he remains in possession of the entrance from *Clifford Street*, and he appears and justifies the acts of his tenant. *Bowes* v. *Law* (4) was quite a different case.

With regard to acquiescence, the Defendants are bound to prove something which amounts to an absolute release of the Plaintiff's rights: *Hogg* v. *Scott* (5); *De Bussche* v. *Alt* (6).

[FRY, J., referred to *Life Association of Scotland* v. *Siddal* (7).]

Nothing of the kind is proved here.

Judgment.

FRY, J., after stating the facts, continued:—

The first inquiry I have to answer is this: Has there been a breach of the covenants contained in the *Pollen* lease and incorporated by reference in the agreement of the 18th of August, 1876? I go back, therefore, to the words of the lease, and I find that the lessee has undertaken "not to affix or permit any outward mark or show of business to be affixed" on the demised premises. Now it appears to me that the wire blind put up in the window in *Cork Street* is an "outward mark or show of business" affixed to the premises. In the first place, is it a mark or show of business? What are the words on the blind? They are

(1) Law Rep. 18 Eq. 303.
(2) Ibid. 1 Eq. 200.
(3) Ibid. 7 Eq. 523.
(4) Law Rep. 9 Eq. 636.
(5) Ibid. 18 Eq. 444.
(6) 3 Ch. D. 286.
(7) 3 D. F. & J. 58.

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"*H. Browne & Co.*, late *Storey, Browne, & Co.* Entrance, 15, *Clifford Street.*" That appears to me to indicate to every reader that there is a firm of *H. Browne & Co.* constituted for the purpose of some business, and that the business which they carry on is the business which was formerly carried on by *Storey, Browne, & Co.* We know that firms described in that manner are not, according to the ordinary course of things in this country, constituted except for the purpose of business. That appears to me, therefore, to be "a mark or show of business" within the meaning of the covenant. Is it an "outward mark or show of business"? It has been urged that, to bring it within the predicate "outward," there must be something "materially external" placed outside the demised premises. I do not think that is the meaning of the word "outward" as here used. I think it refers to a "mark or show of business" which is directed, not to the inner portion of the property, not to a landing, lobby, or entrance-hall inside the property, but which is intended to attract the attention of the outside passers-by. "Outward" means here, according to my view, "directed to the outside," and to persons outside the premises. Then has this "mark or show" been fixed on the premises? It seems to me that it has. The wire blind was certainly fixed. It is not necessary to consider how far the fixing is of a permanent character. The object of the covenant renders the nature of the fixing immaterial. It seems to me, therefore, that the wire blind is within the words of the covenant. Is it within its spirit? I think it is. I think the object and intent of the covenant was that the premises, the house in question, should have the outward aspect of a private dwelling-house. The same observations apply, with very little difference, to the white roller blind. There "*H. Browne & Co.*" are the only words descriptive of the firm, and they appear to me to import that there is a firm carrying on business, and as such to be a show or mark of business, and an "outward" show or mark, just as the wire blind.

The matter appears still more plain with regard to the brass plate, because, not only is it physically external to the building, being fixed only on some iron railings by the entrance door, but it has the description of the business of *H. Browne & Co.* as "tailors" upon it. I hold that each of the three things, the wire

blind, the white roller blind, and the brass plate, fixed as it is to the premises, constitutes a breach of the covenant.

With regard to the underletting without license, for reasons which will presently appear, I do not think it very material to go into an elaborate consideration of whether there was a breach or not. I am inclined to think that there has been a breach, but I do not go fully into that, because the question then arises whether, assuming that there has been a breach of one or both of these covenants, the Plaintiff is entitled to put an end to the agreement. Now, if the matter had rested simply on the words of the clause at the end of the agreement as to non-performance of the covenants, probably I should have felt myself bound to hold that Lord *Coke* was right, if I may use such language with regard to Lord *Coke*, in saying that the word "performance" is not applicable to negative covenants, and that therefore the clause of re-entry could not be *ex vi termini* extended to a negative covenant, a covenant not to do certain things. But I think that Mr. *North* is well founded in his argument when he says that the clause of re-entry must be made conformable to the clause of re-entry in the *Pollen* lease, because it is provided that there shall be inserted in the lease to be executed in pursuance of the agreement, "all such other covenants and conditions as shall be contained in the lease about to be granted to the landlord by the trustees of the *Pollen* estate, with such additions as may be necessary and proper in an underlease." The object is clear, viz., that the underlease shall correspond with the *Pollen* lease so far as to render the determination of the underlease possible whenever the determination of the lease is possible, and I should, therefore, have held in an action for the specific performance of the agreement that a proviso for re-entry, framed in the same terms as that found in the *Pollen* lease, must be inserted in the underlease, either because it is a condition contained in the *Pollen* lease, or because it is an addition proper to be made in an underlease granted under these circumstances. Therefore I think that the right of re-entry would arise on the non-observance or breach of the negative covenant.

But then comes this further consideration. It is said that the Plaintiff has, by the course which he has pursued in this litiga-

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tion, precluded himself from exercising the right of re-entry which I have held to be vested in him. [His Lordship referred to par. 12 of the statement of claim, and to the words of the claim, and continued:—]

In other words, the claim asks for an injunction to give effect to the agreement of the 18th of August, 1876, and asks it in general terms not confined to any limited period: it asks for damages for the breach of that agreement, and then it asks for recovery of the possession of the premises from the Defendants. Now it appears to me that the prayer is in this sense inconsistent, that the whole of the relief asked for could not be had. The Plaintiff could not have at the same time judgment for recovery of the possession of the premises, and a general and unlimited injunction to give effect to the agreement to which, by recovering the premises, he would put an end. The injunction is not in terms asked for merely until the Plaintiff should be able to recover possession in pursuance of the judgment, and it appears to me that it would be an unnatural reading of the claim to suppose that it was intended to ask for an injunction only for that interval of time. Further than that, it appears to me that, by his pleading, the Plaintiff has expressed his present readiness and willingness to act on the agreement, which I am much inclined to think I ought to hold to be a submission by the Plaintiff to treat the agreement as still a matter over which the Court has, if necessary, control. The Plaintiff has, in effect, said, I have always been ready and willing to grant a lease in pursuance of the agreement. Therefore, after the issue of the writ on the 9th of April, and between that date and the 30th of April, when the statement of claim was delivered, the Plaintiff has still continued to treat as subsisting that agreement which it is now said was put an end to and extinguished by the issue of the writ on the 9th of April. It appears to me that I cannot hold that to be the real result of these pleadings. I think the pleadings amount to an assertion that the agreement is still subsisting, and that there has been the settlement of a lease under it. The Plaintiff has endeavoured to corroborate his case by availing himself of the draft lease approved on behalf of the Defendant to carry the agreement into effect, and I think it would be unjust to allow him in the same

pleading to say that he had finally and conclusively elected many days before to put an end to the agreement.

But it is said that I am concluded by authority from taking this view, and the case of *Toleman* v. *Portbury* (1) is cited, in which the Court held that, by a writ of ejectment, there was a final and conclusive election to put an end to the tenancy, and that it was not waived by a subsequent inconsistent claim, rendered under an order made for particulars of breaches, viz., an alleged breach by non-payment of rent, accrued due after the first breach which was relied on as a forfeiture, instead of a claim for mesne profits. But it appears to me that that case is not parallel with the present. An action of ejectment is an unequivocal assertion of a right to present possession. It is equivalent to the old entry, and it is nothing more. The writ in the present case was indorsed, first, for an injunction; secondly, for damages for breach of the agreement; thirdly, to recover possession from the Defendants of such parts of the messuage as were occupied by them pursuant to the agreement. That writ was, in my opinion, not unequivocal; on the contrary, it asked, as I think, for relief which could only be had in the alternative, and, as the Plaintiff did not disclose by the writ which of the two alternatives he desired to pursue, he left the matter open and ambiguous. Therefore the authority cited does not appear to me to apply.

I have come therefore to the conclusion that the Plaintiff is not entitled to recover possession, and the question remains whether he is entitled to an injunction. It was suggested, indeed, that he had lost his right to an injunction, because his counsel did not open that point, but I have already dealt with that and shall not say anything more about it.

Before I deal with the injunction, let me observe that, with regard to the breach by underletting without consent, all that is asked is damages, and, as no evidence of damage has been tendered to me, I can give no damages on that head. That is the reason I have not thought it necessary to inquire with exactitude whether there has or has not been a breach of the covenant against underletting.

The only point then as to the injunction relates to the breach

(1) Law Rep. 6 Q. B. 245; Ibid. 7 Q. B. 344.

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of the covenant not to affix any outward mark or show of business. From what I have already said, it is apparent that in my judgment, the Plaintiff has made out a *primâ facie* case for that injunction. It has been suggested that there has been such an acquiescence on the part of the Plaintiff as entirely bars his right. But, as I have observed during the argument, in order that the Defendant should succeed in that contention, the burden of which, of course, rests on him, he must shew such a course of acquiescence as for ever to preclude the Plaintiff from insisting on his right under the agreement. In my opinion no such case of acquiescence has been made out, and the Plaintiff has not lost his right under the covenant.

One other question remains for consideration, viz., whether *Davis* ought to be included in the injunction. He granted a license to Mrs. *Browne* to put up a moveable brass plate, so far as he was able to give the license, but he required that the brass plate should be approved by his lessor. It does not appear that that approval was ever given, but it does appear that *Davis* remained the occupier of the entrance in *Clifford Street* at which the brass plate was put up by Mrs. *Browne*, and that the only right of Mrs. *Browne* in that entrance was under a license to use it in common with the other occupiers and tenants of the house. *Davis*, therefore, continued in possession of that entrance, and he is responsible to his lessor for everything which has been done upon that entrance. Now what was done by Mrs. *Browne* was a thing which she had no right to do. She had no right under *Davis's* license to do it as against him. He might, therefore, have stopped it at any moment. He did not choose to stop it, though his attention was called to the breach by the Plaintiff, but he allowed the objectionable mark to remain. He could only be relieved from the burden of the injunction if he had shewn these two things, that he had parted with his whole interest in that part of the premises which is affected by the injunction, and that he was entirely free from blame. Neither of those two things has he shewn. It is further to be borne in mind, that he has admitted by his pleadings that the wire blind was erected by his license and consent. On these grounds I decide that the injunction must go against *Davis*. The result will be an injunc-

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tion to restrain the Defendants, their servants and agents, from affixing, or permitting to remain or be affixed upon the messuage, the blinds now in the window in *Cork Street*, and the brass plate at the side of the entrance in *Clifford Street*, or any other outward mark or show of business.

There remains the question of costs. Now it appears to me that the Plaintiff has pursued a course which has put the Defendants in very considerable difficulty. He neither by his writ nor by his statement of claim disclosed whether he intended to go exclusively for an injunction or for ejectment. Moreover, the claim for ejectment was one which, looking at what had taken place between the parties, was, to say the least, a very harsh one. I should not have withheld the costs on the ground of harshness alone, but, seeing that the Plaintiff has come for very much larger relief than I have granted him, I think I am justified under the circumstances in giving the relief without costs, and I do so.

Solicitors for Plaintiff: *Underwood & Son.*
Solicitors for Defendants: *Benn Davis; Lucas & Sons.*

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## OLIVER *v.* OLIVER.

FRY, J.
1878
*Nov.* 15.
*Dec.* 9.

[1877 O. 41.]

*Husband and Wife—Wife's Equity to Settlement—Form of Settlement—Power of Appointment among Children.*

In a settlement of a wife's property made in pursuance of her equity an exclusive power of appointment by deed or will among her children ought to be given to her in priority to the limitations in favour of the children; and the like power was inserted in a case where the husband had, by post-nuptial deed, covenanted to settle the property on trusts not including such a power.

Statement.

ON the 22nd of May, 1863, *George William Oliver* married *Blanche Catherine Sherson*. She was then, under the will of *Isaac James*, contingently entitled, subject to the life estate of her mother, to a share of his estate. No settlement or agreement for a settlement was executed before the marriage. On the 15th of June, 1863, a deed was executed between Mr. *Oliver* of the first

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part, Mrs. *Oliver* of the second part, and trustees of the third part, whereby he covenanted with the trustees that, when and so soon as his wife's interest under the will of *Isaac James* should become an interest in possession, he would do and execute all acts and deeds necessary for vesting that interest in the trustees, upon trust for her for her life, for her separate use without power of anticipation; with remainder for her children, being sons, at twenty-one, and being daughters at twenty-one or marriage, in equal shares if more than one; with remainder as she should by will appoint; with remainder, in the case of personal estate, in trust for her next of kin, according to the *Statute of Distributions*, as if she had died without ever having been married, and in the case of real estate in trust for her right heirs. The wife's interest under the will of *Isaac James* fell into possession in May, 1877. It was of the value of about £17,000.

The writ in the action was issued on the 17th of July, 1877, by Mrs. *Oliver* (by a next friend) against her husband and the trustees of the will of *Isaac James*. The infant children of Mr. and Mrs. *Oliver* and the trustee of the postnuptial settlement were afterwards made Defendants. The writ was indorsed with a claim to have a proper settlement made of the property held in trust for the Plaintiff under the will of *Isaac James*.

The statement of claim alleged that the settlement covenanted to be made by the husband by the deed of the 15th of June, 1863, was not a proper settlement, and that the Plaintiff was not desirous that the covenant should be specifically performed.

The husband delivered a statement of defence and counter-claim. By his defence he said that he was advised that he could not be compelled specifically to perform his covenant contained in the deed of the 15th of June, 1863. And by his counter-claim he said that he executed that deed without any independent advice, and that he was then ignorant that the effect of carrying out its provisions would be to deprive him of all benefit in the Plaintiff's property. And he claimed to have that deed set aside and cancelled; and that, subject to the settlement of such a portion of the Plaintiff's share of the property of *Isaac James* as the Court might think fit to direct, the trustees of his will might be ordered to transfer that share to the husband.

At the trial, on the 15th of November, 1878, the counter-claim of the husband was abandoned, and it was agreed that a settlement in pursuance of the husband's covenant would be a proper one.

*North*, Q.C., and *Wolstenholme*, for the Plaintiff, suggested that a power of appointment among children ought to be given to the wife in the first instance.

*Northmore Lawrence*, for the children and the trustee of the settlement.

*Cookson*, Q.C., and *Carson*, for the husband.

*Fischer*, Q.C., and *Street*, for the trustees of the will.

FRY, J.:—

I will make a declaration that a settlement in pursuance of the covenant will be a proper one. If any authority can be found for the insertion of the power, the case can be mentioned again.

Dec. 9. The case was again mentioned.

*North*, Q.C., and *Wolstenholme*, for the Plaintiff:—

The question whether such a power should be inserted does not appear to have been discussed in any of the reported cases. In *Watson* v. *Marshall* (1), *Carter* v. *Taggart* (2), and *Spirett* v. *Willows* (3), the power was inserted; but in *Gent* v. *Harris* (4) *In re Suggitt's Trusts* (5), *Croxton* v. *May* (6), and *Walsh* v. *Wason* (7), it was not. Such a power is for the benefit of the children.

*Northmore Lawrence*, for the children:—

The power would not be for the benefit of the children.

*Cookson*, Q.C., and *Carson*, for the husband:

If the settlement is reformed at all the husband ought not to be excluded.

(1) 17 Beav. 363.
(2) 5 De G. & Sm. 49; 1 D. M. & G. 286.
(3) Law Rep. 4 Ch. 407.
(4) 10 Hare, 383.
(5) Law Rep. 3 Ch. 215.
(6) Ibid. 9 Eq. 404.
(7) Ibid. 8 Ch. 482.

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FRY, J.:—That was the bargain made with you.

*Fischer*, Q.C., and *Street*, for the trustees of the will.

FRY, J.:—

I think the wife ought to have the power of appointment. If I could I would insert a joint power of appointment to the husband and wife, for I think that such powers are for the benefit of families; but the authorities do not go to that extent. The wife must have an exclusive power of appointment by deed or will among the children. In other respects I confirm the settlement which has been made.

Solicitors: *Lucas & Son; Bellfrage & Middleton; F. Lamb; C. A. Hilliard.*

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*Dec.* 20.

## ASHLEY *v.* TAYLOR.

[1876. A. 55.]

*Practice—Amendment—Adding Party—Death of a Defendant—Abatement—Revivor—Date of Order made subject to production of Affidavit of Service—Rules of Court*, 1875, *Order* XVI., *r.* 13; *Order* XXVII., *r.* 1; *Order* L.

An action was brought against three Defendants, claiming damages in respect of their alleged conspiracy and false representations. Before the action could come on for trial one of the Defendants died. Administration was taken out to his estate. The Plaintiff did not apply for an order of course to continue the proceedings against the administrator, but he obtained in Chambers an order giving him leave to amend the writ and statement of claim by adding the administrator as a Defendant, and by making allegations that the estate of the intestate had been benefited by reason of the matters complained of in the action. The administrator was served with notice of the summons on which this order was made, but did not appear on the hearing, and the order was drawn up on the production of an affidavit of service of the summons on him. The order as drawn up was dated as of a day prior to the date of the filing of the affidavit. The writ and statement of claim, having been amended in pursuance of the order, were served on the administrator. He then entered a conditional appearance and moved to discharge the order for irregularity:—

*Held*, that the order had been regularly made under Order XXVII., rule 1, and Order XVI., rule 13.

But, *held*, that the administrator ought not to have been served with the

summons, and that the order must be amended by striking out the affidavit of service.

*Held*, however, that the order must bear date the day on which the affidavit was filed.

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Statement.

THE writ in this action was issued on the 31st of March, 1876, against three Defendants, *Joseph Taylor*, *J. P. Endean*, and *Charles Rule*, and was indorsed with a claim for £500 damages against the Defendants for combining together to form a company, called the *East Llangynog Lead Mining Company*, to purchase a mine called the *Craig-y-Mwyn Mine* at an exorbitant price in order to create purchase shares, divisible among themselves, to be disposed of by them to the public, certain of such shares having been purchased by the Plaintiff. The writ was marked with the name of Vice-Chancellor *Malins*. An amended statement of claim was delivered on the 9th of May, 1876. It stated that the company was formed by the Defendants in December, 1870, with a nominal capital of £100,000, divided into 50,000 shares of £2 each; that advertisements were issued by them describing it as a very profitable investment; that Plaintiff was thereby induced to purchase 100 shares, for which he paid £300, and which were transferred to him by *J. P. Endean;* and that the mine was entirely worthless to the knowledge of the Defendants. In April, 1874, the company resolved on a voluntary liquidation, and the mine, which had been sold to the company for £90,000, was sold by auction for £3600, and, after paying the costs of the liquidation, a first and final dividend of 1*s.* per share was paid to the shareholders. The Plaintiff claimed £500 damages occasioned to him by reason of the conspiracy, and false and fraudulent representations of the Defendants and their agents, and the costs of the action. The Defendants having delivered statements of defence, and the Plaintiff having delivered his reply, notice of trial was given on the 25th of May, 1877. The action was afterwards transferred to Mr. Justice *Fry* for trial. The trial not having taken place, on the 23rd of March, 1878, the Defendant *J. P. Endean* died. On the 27th of August, 1878, administration to his estate was granted to *Alfred Endean*. The Plaintiff did not apply for an order that the proceedings in the action might be continued against *Alfred Endean* as administrator of *J. P. Endean*, but the Plaintiff issued a

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summons in the Chambers of Vice-Chancellor *Malins*, returnable on the 6th of November, asking that the Plaintiff might be at liberty to amend the writ and statement of claim by adding *Alfred Endean*, the administrator of the estate of *J. P. Endean*, as a Defendant, and by making allegations that the estate of *J. P. Endean* had been benefited by reason of the matters complained of by the Plaintiff in the action, and making such further amendments as the Plaintiff might be advised for the purpose of continuing the action against *Alfred Endean* as administrator, and also by adding a claim to have the sale of the shares, the subject of the action, set aside, and a claim to administer the estate of *J. P. Endean* in case *Alfred Endean* should not admit assets sufficient to answer the Plaintiff's claim. The summons was served on the solicitor of *Alfred Endean* on the 1st of November, and was heard by the Chief Clerk on the 6th of November. The Defendants appeared, but *Alfred Endean* had been advised not to appear, and did not appear. The hearing was adjourned to the 23rd of November for the purpose of serving *Alfred Endean* personally with the summons. He was served on the 19th of November, and on the 23rd of November the Chief Clerk made the order asked for, subject to the production of an affidavit of service of the summons upon *Alfred Endean*. The order as afterwards drawn up was dated the 6th November, and there was entered in it as read an affidavit, dated the 25th of November, of service upon *Alfred Endean*. By special leave of Vice-Chancellor *Malins* and of Mr. Justice *Fry* a motion was now made on behalf of the administrator to discharge the order of the 6th of November for irregularity. The writ and statement of claim had been amended in pursuance of the order, and had been served on him, and he had entered a conditional appearance.

Argument.

*North*, Q.C., and *Grosvenor Woods*, for the administrator:—

Such an order could not be properly made as against the administrator, who was a stranger to the action. The Plaintiff ought to have obtained an order of course under Order L. to continue the proceedings against the administrator: *Roffey* v. *Miller* (1). The administrator could then have moved to discharge the order on the ground that the cause of action disclosed by the original writ did

(1) 24 W. R. 109.

not survive against him. At any rate, the date of the order is wrong, and the summons ought not to have been served on the administrator.

[They were stopped by the Court.]

*C. H. Turner* (Sir *H. James*, Q.C., and *Morgan Howard*, Q.C., with him), for the Plaintiff:—

The date of the order is a mere clerical error; it is the date when the summons was made returnable. We admit that the cause of action shewn by the original writ did not survive against the administrator. If the common order to continue the proceedings against him had been obtained, it must have been discharged on his application. The object of adopting the other course was to save unnecessary expense. Order XXVII., rule 1, enables the Court at any stage to allow an amendment of the writ and statement of claim, and Order XVI., rule 13, gives power to the Court at any stage to add the name of any party who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action. The two things can be done by one order. The object of the order is to enable the Plaintiff, without commencing *de novo* and throwing away all the costs already incurred, to shew a cause of action which does survive against the administrator. In *Budding* v. *Murdoch* (1) a Plaintiff was allowed to change his cause of action at the hearing. There the new case might have been raised at first; here the death of the Defendant was the act of God. If the order could have been made *ex parte* as far as the administrator was concerned, it is none the worse for being made on notice. He did not appear, and no costs have been incurred by him.

[He referred also to *King* v. *Corke* (2).]

*Cookson*, Q.C., and *Yate Lee*, for the Defendant *Rule*.

*Bunting*, for the Defendant *Taylor*.

*Grosvenor Woods*, in reply:—

The rule does not apply to such a case. I rely on the irregularity

(1) 1 Ch. D. 42. (2) 1 Ch. D. 57.

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in the form of the order. Under the old practice a representative of a deceased co-Defendant could not be brought before the Court by means of new allegations: *Webb* v. *Wardle* (1); an order of revivor was necessary.

Judgment.

FRY, J.:—

This is a motion to discharge an order simply on the ground of irregularity, and it must be understood that I express no opinion as to the propriety of allowing the amendments, which is a matter of discretion. [His Lordship stated the facts, and proceeded:—] It is admitted that on the death of the Defendant *J. P. Endean* the original cause of action did not survive or continue against his representative, but that the action has become abated as regards him, and that the power given by Order L. of bringing the representative of a deceased Defendant before the Court does not apply. It is said, however, that the Plaintiff had another cause of action against the deceased Defendant which does survive against the administrator, and which entitles the Plaintiff to certain relief against his estate. And the Plaintiff has obtained an order giving him leave to do two things, to make the administrator a party to the action, and to amend the writ and statement of claim by alleging facts which shew a cause of action which survives. In my opinion this order was in substance quite regular. Rule 1 of Order XXVII. gives the Court power, at any stage of the proceedings, to allow either party to alter his statement of claim or defence. It follows that it was not irregular to allow the amendment in this case. Then rule 13 of Order XVI. gives the Court power at any stage of the proceedings to order that the name of any party or parties, whether Plaintiffs or Defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. The Chief Clerk has come to the conclusion that the administrator of the deceased Defendant is a necessary party to the action, and it appears to me, therefore, that there was power to add him as a Defendant, and that such an order was quite regular. If these two things could be done by separate

(1) 11 Jur. (N.S.) 278.

orders, they could equally well be done together by one order. I am of opinion, therefore, on the principal point, that the order was quite regular. But I think that the order ought clearly to have been made *ex parte* so far as the administrator was concerned. He was an entire stranger to the action, and it was irregular to serve him with the summons and to enter an affidavit of service on him in the order. Moreover, the order is on its face irregular, inasmuch as it bears date the 6th of November, and there is entered in it an affidavit of the 25th of November. It must be amended by dating it as of the day on which it was really made, *i.e.*, the day on which the affidavit of service was filed, and by striking out the affidavit of service. In other respects it will remain unaltered. An order ought never to bear a fictitious date. The costs of the motion will be costs in the action. The Plaintiff must pay the costs of the Defendants *Taylor* and *Rule*, and add them to his own.

Solicitors: *C. Gregory; Green & Pridham; Bolton, Robbins, & Busk*; *A. D. Smith & Wood.*

C. J. B.

1878
Dec. 18.

## *In re* STANLAKE & SON. *Ex parte* PRIESTLEY.

*Liquidation—Fraudulent Debtors—Order to prosecute—Order nunc pro tunc—Costs of Prosecution—Debtors Act*, 1869, *s.* 11, *sub-s.* 4, *and ss.* 16, 17.

An order to the trustee to prosecute for offences under the *Debtors Act*, 1869, s. 11, sub-s. 4, having been refused, and the debtors having, subsequently to such refusal, been prosecuted by the trustee and convicted of offences under this section:—

*Held*, that under the circumstances the order to prosecute ought to have been made in the first instance, and that the trustee was now entitled to an order to prosecute *nunc pro tunc*, in order to recover the costs of the prosecution. Costs of the appeal out of the estate.

Statement.

THIS was an appeal from the Judge of the County Court of *Hampshire*, holden at *Portsmouth*, refusing an application for an order to prosecute the debtors, Messrs. *Stanlake & Son*, for offences under the *Debtors Act*, 1869, s. 11, sub-s. 4.

Messrs. *Stanlake & Son*, the debtors, who formerly carried on business as naval and military tailors at *Portsmouth*, presented a petition for liquidation on the 19th of August, under which *Joseph Priestley* was, on the 11th of September, appointed trustee. Shortly after the presentation of the petition, and before the appointment of the trustee, inquiries were set on foot as to the amount of the debtors' stock, when it was ascertained that goods to the value of £279 had been fraudulently concealed upon the premises occupied by the firm, and the debtors, upon being questioned by the receiver, admitted the fact.

On the 4th of October the trustee obtained a warrant against the debtors, under which they were arrested and remanded, after some formal evidence, by the magistrates until the 11th of October, on which day the examination of the prisoners was resumed, and they were again remanded until the 14th of October, when they were committed for trial at the ensuing Quarter Sessions, to be held on the 18th of October.

On the 11th of October application was made to the County Court Judge on behalf of the trustee for the usual order giving leave to prosecute. In answer to this application the Judge stated that as at that time the debtors had not been examined in the liquidation, there was nothing on the file of proceedings to

justify him in making the order asked for; but that when a verified copy of the whole of the depositions had been put on the file the application might be renewed. A complete copy of the depositions taken before the magistrates, verified by affidavit, having been filed, the application for leave to prosecute was renewed on the 17th of October and refused by the County Court Judge, on the grounds that, 1, if any offence had been committed by the debtors it had been condoned by the subsequent acceptance by the trustee and the creditors of the property concealed; 2, that as the confession of the debtors took place before the trustee was actually appointed, the trustee, as trustee, had not been misinformed by them of the true state of their affairs; and the concealed property having been set out in and described in the statement of their affairs produced at the first general meeting on the 11th of September, and subsequently sold, no one had been defrauded; 3, that he had received an order from the Lord Chancellor directing him to refuse any order to prosecute unless such prosecution was instituted, undertaken, and carried out by the Treasury. From this order the trustee appealed.

Statement.

On the 18th of October the debtors were tried, convicted, and sentenced to four months' imprisonment. The trustee had been bound over to prosecute, and the Solicitors to the Treasury had authorized the trustee's solicitor to act as their agent in the prosecution.

*C. E. Jones* (*Winslow*, Q.C., with him), for the Appellant:—

Argument.

The object of this application is to be allowed the costs of the prosecution. Under the *Debtors Act*, 1869, s. 17, the county and the Treasury will not and cannot pay us the costs of the prosecution unless the trustee obtains an order giving leave to prosecute.

BACON, C.J.:—

Judgment.

I think that under the circumstances the trustee is entitled to have the order of the County Court Judge discharged, and an order *nunc pro tunc* substituted, giving leave to prosecute. I must also allow you the costs of this appeal out of the estate.

Solicitors: *Phelps, Sidgwick, & Biddle.*

C. J. B.
1878
Dec. 18.
1879
Jan. 13.

## *Ex parte* LANCASTER BANKING CORPORATION. *In re* WESTBY.

*Close of Bankruptcy—Undischarged Bankrupt Debtor—Property acquired by Bankrupt Debtor after close of Bankruptcy—Rights of Creditors—Bankruptcy Act*, 1869, *s.* 54—*Bankruptcy Rules*, 1870, *r.* 183—*Forms in Schedule to Bankruptcy Rules*, 1870, *No.* 70—*Practice.*

20 Ch D 312
24 Ch D 678

After the close on the 1st of December, 1874, of a bankruptcy, the debtor, who had been made bankrupt, became entitled, under the will of a testatrix who died in 1875, and under a decree dated the 8th of January, 1878, in a suit for the administration of her estate, to property amounting to about £20,000. During the three years which elapsed after the close of the bankruptcy, the debtor did not pay 10*s.* in the pound, and he had not obtained an order of discharge.

On the 26th of February, 1878, a creditor, whose name and debt appeared in the bankrupt's statement of affairs, but who had not proved before the close of the bankruptcy, sent in a proof for his debt to the Registrar, who had become the trustee:—

*Held*, that the proof was good, and that the creditor, notwithstanding that his debt was not proved before the close of the bankruptcy, was entitled to apply for leave to enforce payment of his debt as a judgment debt against the property of the debtor, under sub-sect. 2 of sect. 54 of the *Bankruptcy Act*, 1869.

Upon the granting of an application for the sanction of the Court, as required by sub-sect. 2 of sect. 54 of the *Bankruptcy Act*, 1869, a notice must be inserted in the *Gazette*, as prescribed by Form 70 in the Schedule to the Bankruptcy Rules, 1870.

Statement.

THIS was an appeal from an order of the County Court for *Lancashire*, held at *Preston*.

On the 28th of June, 1870, *Jocelyn Tate Fazakerley Westby*, of *Mowbreck Hall, Lancashire*, was adjudicated bankrupt, having made default in payment on a debtor's summons.

On the 8th of July, 1870, he filed a statement of affairs. Amongst the secured creditors appearing in the schedule were the following:—

| | |
|---|---|
| The *Lancaster* Bank holds a joint and several promissory note signed by Mrs. *Westby*, Mrs. *Fazakerley Westby*, and self . . . | £300 0 0 |
| Also a joint and several promissory note of Mrs. *Fazakerley Westby*, Captain *B. H. Westby*, and self, dated 24th August, 1866 . . | 950 0 0 |

Under the head of property appeared the following :—

"My marriage settlement contains a provision that the trustee, *A. B. Cowdell*, is to raise and pay out of the rents and profits of the settled estates to me during such part of my life as I shall not have done any act whereby the annuity hereinafter provided for him would, if payable to me without any restriction, be or become vested in or payable to some other person, one clear annual sum of £200.

"Wearing apparel, watch and pin, supposed value not exceeding £20."

A meeting of creditors was held, at which one *Thomas Bilsborough* was nominated trustee, but he declined to act. The creditors made no other nomination, and the Registrar of the *Preston* County Court became *ex officio* trustee of the bankruptcy.

On the 1st of December, 1874, the Registrar reported to the Court that the whole of the property of the bankrupt consisted of estates settled on the wife of the bankrupt; that the bankrupt had no property or available assets beyond that contained in the settlement, and that there was no probability of any property or estate coming into his hands for the benefit of his creditors. This report was made upon what afterwards turned out to be a mistake in law, it being at the time erroneously supposed that a life annuity of £200 to which the bankrupt was entitled was determinable on his bankruptcy.

On the same 1st of December, 1874, the Court made an order declaring the bankruptcy to be closed.

Previous to the date of this order creditors of the bankrupt to the amount of £3095 2*s.* 9*d.* had proved their claims, but the bank was not among them. Claims to the extent of about £7000 remained unproved at the date of the order closing the bankruptcy.

On the 27th of October, 1875, the bankrupt's wife died, having by her will made certain bequests in favour of the bankrupt under a power of appointment reserved to her by the marriage settlement; and this will was partially revoked by subsequent codicils. A suit of *Bryning* v. *Veevers* was instituted in the Chancery

C. J. B. 1878-9 *Ex parte* LANCASTER BANKING CORPORATION. *In re* WESTBY. Statement.

side of the County Palatine Court of *Lancaster* to have the will construed, and the trusts of the settlement and will administered under the direction of the Court. On the 8th of January, 1878, the Vice-Chancellor delivered judgment, deciding in effect that the annuity of £200 a year under the settlement was never determined, but vested in the trustee in bankruptcy; also that the arrears of the annuity which since the bankruptcy had been paid by the trustees to the wife must be refunded by them; but he also held that under the testatrix's second codicil the trustees were entitled to a charge upon the settled estates to the extent of these arrears, which he considered as advances. Subject to this charge and to a provision being made for the future payment of the annuity to the trustee in bankruptcy, and to a legacy of £500, the Vice-Chancellor further held that, upon the true construction of the will and codicils, the bankrupt was entitled to the settled property absolutely for his own use and benefit, and that the same had not vested in the trustee in bankruptcy. The property thus acquired was stated to amount to upwards of £20,000.

On the 26th of February 1878, the bank transmitted to the Registrar a proof of their claim, amounting to £1565 2*s.* 9*d.* The Registrar had not admitted the proof, but no objection having been taken to it, he had not disallowed it.

On the 22nd of October, 1878, the County Court Judge made an order dismissing an application on behalf of the bank for leave to enforce the payment for the unsecured balance of their debt against the property to which the bankrupt had become entitled under the order of the 8th of January, 1878.

This was the order appealed from.

The following is an extract from the learned County Court Judge's judgment:—

"The debt sought to be enforced appears to have been in existence and provable against the estate of the bankrupt before the close and during the continuance of the bankruptcy. I incline to think that, notwithstanding the close of the bankruptcy, the debts may still be proved. The general rule has been stated to be that as long as there remain estates distributable under the bankruptcy, the creditors may come in and prove: *Ex parte Boddam* (1).

(1) 2 D. F. & J. 625.

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When the proof is formally admitted, and the applicants are brought within the scope and meaning of the 2nd sub-section of the 54th section of the *Bankruptcy Act*, I think that the proof will then rank with the other proved debts of the bankrupt, and that all will be equally entitled to be paid from the estates distributable under the bankruptcy. But the application is that the debt shall be enforced against the beneficial interest to which the bankrupt has been declared to be entitled under the order of the Court of Chancery of *Lancashire* of the 8th of January last—so far as that beneficial interest is given to the bankrupt by the testamentary dispositions made by Mrs. *Westby*—and I understand the property applied against altogether depends on those dispositions. I am not able to accede to the application, Mrs. *Westby's* death having occurred after the close of the bankruptcy. The case of *In re Pettit's Estate* (1), decided by Vice-Chancellor *Bacon* in January, 1876, is a binding authority, and is precisely in point on this question. There the bankruptcy was closed before 4 o'clock on the 14th of April, and after 5 P.M. on the same day the testator died, leaving the bankrupt a legacy. The trustee in bankruptcy claimed it; but the claim was disallowed, and it was decided that after the close of a bankruptcy, though the bankruptcy continued for certain purposes, it did not continue so as to vest property subsequently acquired by the bankrupt in the trustee; and the very recent case already referred to and decided by the Vice-Chancellor of *Lancashire* is clearly and decisively in accordance with the decision. So far, therefore, as the application on behalf of the *Lancaster Bank* asserts in anywise a right to charge the debt of the bank on the property to which the bankrupt has become entitled under the will and codicils of Mrs. *Westby*, it cannot be acceded to."

Statement.

Argument.

*Winslow*, Q.C., and *Lane*, for the Appellants, the Bank:—

The judgment of the Court below is based on a misapprehension of *In re Pettit's Estate*. We do not in the least dispute that authority. No doubt property falling in after the close of the bankruptcy does not vest in the trustee. But we are not applying on behalf of the trustee; we apply on behalf of a separate creditor, seeking the statutory remedy for his own debt.

(1) 1 Ch. D. 478.

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The scheme of the 54th section is this: Three years are given to the bankrupt, during which he may acquire property, and if he succeeds in paying 10*s.* in the pound, he is entitled to his order of discharge, and becomes a free man. But if he fails to accomplish this, then, at the end of the three years, any unsatisfied creditor may enforce his debt as if it were a judgment debt against any property of the debtor.

Neither the 54th section, nor the 172nd rule which relates to it, excludes any creditor who has proved for his debt, no matter whether he has proved before the close of the bankruptcy or not. In this particular case, in consequence of the Vice-Chancellor's decision on the 8th of January, 1878, it turns out that there are old assets of the bankruptcy, namely, the arrears of this annuity of £200, still to be distributed. So that there must, in any event, be a meeting of the old creditors, for the purposes of distribution under sect. 52. As claimants against those assets alone, we shall be held entitled to prove.

The provisions of the repealed Insolvent Debtors Acts may be referred to by way of illustration. The originating idea of the 54th section is to be found in the 10th section of the 53 Geo. 3, c. 102, which was amended by 54 Geo. 3, c. 23, s. 14.

*De Gex*, Q.C., *Smyly*, and *Grosvenor Woods*, for the Respondent, the bankrupt:—

After a bankruptcy is closed, it exists for certain purposes only: *In re Pettit's Estate* (1). Amongst these purposes is not that of setting up as a judgment debt a simple contract debt which has never been proved. Eight years have elapsed. Not until seven years and eight months from the date of the bankruptcy did the creditor interfere. Can it have been intended that a creditor who has lain by all that time, is to be allowed to come long after six years and obtain a remedy which will turn his simple-contract, statute-barred debt into a judgment debt? To hold this would be to pronounce the Statutes of Limitation repealed, for the result would practically be to withdraw all limit of time from a creditor's proceedings in such a case; he might come after the lapse of twenty years.

The language of the Act of Parliament is clear: "Any balance

(1) 1 Ch. D. 478.

remaining unpaid in respect of any debt proved in the bankruptcy." This was not a debt "proved in the bankruptcy;" and there is nothing to shew that a debt not proved during the bankruptcy may be proved after its close.

Consistent with the terms of the 54th section is the language of the rule, 172 of January, 1870: "Where a bankrupt, who has not obtained his order of discharge, shall after the close of the bankruptcy pay or tender to the several creditors who have proved their debts." . . . "Creditors who have proved their debts" mean, according to the 54th section, creditors who have proved "in the bankruptcy," that is to say, during the bankruptcy.

To allow creditors who have not proved to rank with creditors who have, would be an injustice. The object of the Act was to put the bankrupt's affairs altogether into the hands of his creditors. Sect. 51 shews how, after a bankruptcy has been closed, the trustee may obtain his release. If a creditor who has been standing out till then is allowed to enforce his debt simply by sending in his claim upon an affidavit, it is quite possible that his proof may be admitted without any scrutiny, for the trustee may not have funds with which to contest the proof. This would be dangerous for the debtor and unjust to the other creditors.

The 54th section makes it perfectly clear that the Legislature intended that the creditor should have three years within which to prove. To allow this application would be a further hardship on this debtor in this way—that whereas in his statement of affairs the bank appeared as a fully secured creditor, and they have been lying by all this time, it was a not unfair assumption on his part that they were content to rest on their securities.

Rather than permit a creditor who has thus lain by to come in merely to have his debt enforceable as a judgment against the bankrupt, the Court will fix the limit at three years.

The decision in *In re Pettit's Estate* (1) stops any property from coming in to the trustee. Does it not also fix a limit to the class of creditors? This provision whereby a bankrupt is to have three years within which by paying 10*s.* in the pound to his creditors he is to be entitled to his discharge, was intended to be confined to those creditors who had been diligent enough to prove during

(1) 1 Ch. D. 478.

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that period. Otherwise he would not know to whom the 10*s.* in the pound was payable. He might have arranged to pay all such as had proved, and then at the last moment, even after the three years, some creditor might come in, and the admission of his claim might destroy the arrangement.

Even if the proof should be held admissible, the bankrupt ought to have time given to consider and meet the claim.

Judgment.

BACON, C.J.:—

This case is of some importance, and perhaps the more so because of the rarity of such occurrences as this. I never heard of such a case. It is a case in which a man became bankrupt in 1870; the bankruptcy closed in 1874, and there were no assets whatever, and then afterwards he became a very rich man. I am told that the law is that he is able to defy his creditors and to keep what he has subsequently acquired, in spite of their unquestionable claims. If that were the state of the law I should regret it very much; but it is not the state of the law. The law is very plain, and descends to very minute particulars in order that justice may be done to every person concerned in the matter of a bankruptcy.

Reference has been made to the Insolvent Debtors Acts. Those Acts came to an end on the passing of the present *Bankruptcy Act*, under which we are now acting. I am not at liberty to import into the provisions of this statute any of those to be found in the Insolvent Debtors Acts, or the proceedings established upon the provisions of those Acts. But it is of great value, in my opinion, when I am asked to construe this Act, that I should keep in mind that this Act, while putting an end to the practice under the Insolvent Debtors Acts, furnishes a substitute for it, and follows the same rules—I mean the rules of law which were the foundation of the Insolvent Debtors Acts. Under the Insolvent Debtors Acts, although a man was relieved from his imprisonment, and allowed to go back in a sense a free man, yet the judgment which he was compelled by law to execute gave his creditors power over any property which he might acquire, subject always to the consideration due to subsequent creditors.

Sect. 54 and other sections of the *Bankruptcy Act* of 1869

have been referred to, and the meaning of those sections appears to me to be beyond the possibility of doubt. The 47th section is that which provides for the closing of the bankruptcy. By that section it is provided that when the whole estate shall have been realized, or if it is thought by the trustees no more property can be got in without unreasonable delay and expense, then the bankruptcy shall be deemed to have been closed. Then the 48th section provides that "when a bankruptcy is closed, or at any time during its continuance, with the assent of the creditors testified by a special resolution, the bankrupt may apply to the Court for an order of discharge," and then under circumstances there mentioned he may procure his discharge. Then the 54th section, which is more important to the matter we are considering, provides as follows:—[His Lordship read the former part of the section, and continued:—]

The stress of Mr. *De Gex's* argument was, that this present Appellant could not be heard, because he had not proved his debt before the bankruptcy was closed. I find no warrant in the statute and no reason in principle why I should adopt any such construction. I find the words of the Act of Parliament clear that debts provable under the bankruptcy shall for the period of three years not be enforced against the debtor. The reason of that is perfectly obvious. If I were to seek for a reason, it is, that during the three years, by the exercise of his industry, he may pursue his calling, whatever it is, free from the pressure of debts existing at the time of the bankruptcy or provable under the bankruptcy. If during that time he pays 10*s.* in the pound, which he would not be able to do unless he were a free man, he shall have his discharge. If the bankruptcy was not closed, all that he acquired during the three years would be by law vested in the trustee; but the law alters that, and says that after the close of the bankruptcy and for three years thereafter the debtor shall be a free man. All that he earns, gains, or acquires in any way, shall be his. If he is honest enough out of what he acquires, and if it is enough for the purpose, to pay his creditors 10*s.* in the pound, he is to have his discharge, but if he fails to do that, the second provision of the 54th section comes into effect. [His Lordship then read the 2nd sub-section, and continued:—] It is impossible to read words

C. J. B. 1879 *Ex parte* LANCASTER BANKING CORPORATION. *In re* WESTBY. Judgment.

more clear or distinct. Argument against such words cannot be sustained. The argument founded on the *Statute of Limitations* as an answer to this claim is not tenable for a moment. The *Statute of Limitations* has nothing to do with the bankruptcy laws. When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the *Statute of Limitations* has no application at all to such a case, or to the principles by which it is governed. I say that because here it appears that the present Appellant was a secured creditor. He found that there was no estate except that which was pledged to him, and he did not trouble about it until he became aware of the fact that his debtor, who was a penniless man at the time of the bankruptcy, had become a wealthy man, and able to pay his debt. Then he sent a proof of his debt, and he became, in the plain words of the statute, "a creditor who has proved." He always had a debt provable.

Now it is said that the manner in which the debt was proved is questionable. Mr. *De Gex* has declined to argue that point strenuously, but that the debt is properly proved I cannot entertain a shadow of a doubt. How else could it be proved? It is sent to the person whose duty it is to accept and admit the proof on the evidence of the accuracy of that proof. The only person to whom the proof could be tendered receives it, and receives it without objection; and more than that, when the matter was discussed before the Judge, no shadow of objection to the proof was made, as I understand, or to its admission in the case. It is said that the Registrar, being trustee, is different from any other trustee, and it is said that the trustee knows nothing about it. I cannot hear it imputed to the Registrar of the Court of Bankruptcy, who by law has cast upon him the duty of trustee, that he has so utterly neglected his duty as to know nothing about the proof of any particular creditor when sent in. I suppose on the evidence there appeared to him no objection, but whatever it was, he in the discharge of his duty as Registrar and trustee of this bankruptcy received the proof, and received it without objection.

Then it is said that the rules point out a different course of

procedure. The rules are perfectly consistent with the statute. The rules recognise the fact that, the bankruptcy being closed, for three years the creditors are to keep their hands off the bankrupt. The statute gives him a privilege during those three years, and the opportunity of paying 10*s.* in the pound; but if he does not avail himself of that opportunity, then, under the 54th section, a creditor who has proved his debt is a judgment creditor entitled to enforce his judgment against any property of the bankrupt upon the terms mentioned in the statute.

But it is said that one of the provisions of the statute is that it shall be ascertained whether there are any existing subsequent creditors. What ought to have been done in this case was, in my opinion, not to reject the application, but to put it in the proper course of inquiry to ascertain whether there was any reason, having regard to the rights of other creditors, why the judgment should not be at once executed against any property of the debtor; and such inquiries must now be made.

It is impossible to refer to any precedent on the subject, but, first, the sanction of the Court is required, and the extent to which the judgment is to be executed is also to be prescribed: "At the time and in the manner directed by such Court, and after giving notice," and so on. Then the rule points out that there are to be advertisements in the *Gazette*, but there is no difficulty whatever in inserting proper advertisements in order to ascertain that which the debtor has not furnished the Court with. He has not said that there are any subsequent creditors.

*De Gex*, Q.C., objected that the application was not in the right form.

BACON, C.J.:—The application is perfectly in the right form. It is true it does not go into those particulars mentioned in the 54th section, which the Court must take into consideration; but when an application is made in the form of the notice of motion before me, it becomes then incumbent on the Court to ascertain in what manner, to what extent, and at what time the judgment shall be put into execution against the property of the bankrupt.

*De Gex* referred to the Bankruptcy Rules, 1870, rule 185.

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BACON, C.J., referred to Form No. 70 in the schedule to the Rules.

*De Gex* observed that the notice prescribed by Form No. 70 had not been issued.

BACON, C.J. :—It may be issued now. In the meantime the application was quite right, because it was when the application was before the Court that the direction should have been given.

After some further observations,

BACON, C.J., added :—In order to avoid collusion between the debtor and any favoured creditor, I consider that the statute renders it imperative on the Court to direct advertisements to issue. I do not think that the notice of motion is objectionable in point of form. I must discharge the order of the Court below, and, it appearing that the close of the bankruptcy was on the 1st of December, 1874, and that the debt of the Appellant has been proved in the bankruptcy, direct a notice to be issued that all persons who have since become creditors of the bankrupt have leave to attend the Court on a day to be fixed, and shew cause against the application for leave to issue execution. Any objecting creditor may appear in answer to that notice and satisfy the Court, if he can, that the order applied for should be modified in some way, either as to time, amount, or anything else.

*De Gex* asked for the costs of the bankrupt—at all events, out of the estate.

BACON, C.J. :—No; they will not be out of the estate. He is a man with £20,000 in his pocket, and he must pay the costs of unsuccessfully attempting to baffle this just application.

Solicitors: *W. R. A. Kime*, agent for *Buck & Dicksons, Preston : Milne, Riddle, & Mellor*, agents for *Slater & Heelis, Manchester.*

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1 C. P. D. 1 P. D.

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5. —— *Colonial Duties—Pecuniary and Residuary Legatees.*] A testator whose assets consisted partly of personal estate in the colony of *Victoria*, where duty is payable on the property of all deceased persons, died domiciled in *England*, and by his will gave many pecuniary legacies, and divided the residue among some of the pecuniary legatees:—*Held*, that the duties attaching in *Victoria*, and all expenses of realization were payable out of the general estate before distribution, and that the pecuniary legatees were entitled to their legacies free of all colonial duties and expenses except the English legacy duty. PETER *v.* STIRLING - - - - 279

6. —— *Conversion—Money directed to be laid out in Land—Intestacy—Real or Personal Estate.*] Where personal estate is bequeathed upon trusts for conversion into land to be held on trusts which ultimately fail, land purchased before the failure of the trusts goes to the next of kin as real estate. *Reynolds* v. *Godlee* (Joh. 536, 582) overruled. CURTEIS *v.* WORMALD - - - - 172

7. —— *Mortgage—Locke King's Act* (17 & 18 *Vict. c.* 113)—*Original Debt and further Advances—Primary and Secondary Securities.*] A testator, a merchant, was in the habit of borrowing money from his bankers from time to time, depositing securities with them upon the occasion of each advance; and on the 29th of March, 1876, his total indebtedness amounted to £62,000, for which his bankers held various stocks and shares as security. On the 30th of March, 1876, the testator applied for a further advance of £15,000, and executed a memorandum by which he charged that sum upon his freehold property at *Caterham*, and agreed that the security was to cover any money due from time to time from him to his bankers. He at the same time deposited the title deeds of the *Caterham* property with his bankers. He received the £15,000, and also further advances on subsequent dates; and he also subsequently deposited with the bankers certain further securities, including the title deeds of freehold and leasehold property, stocks and shares, but no subsequent memorandum was executed.—Some of the stocks and shares were sold by the bankers in the testator's lifetime, and the proceeds applied in reduction of the debt, which at his death stood at £28,625.—It appeared from a memorandum book kept by the testator, and from his ledger, that the successive advances and the successive deposits were treated by him as forming one running account. By his will he devised his *Caterham* property to certain persons, and devised and bequeathed his residuary real and personal estate in trust for sale, and to divide the proceeds, after payment thereout of his debts, among certain other persons:—*Held*, that the debt due at the testator's death, and the interest thereon from that date, must be borne by the various properties then held by the bankers, rateably, according to their respective values at the death.—*Lipscomb* v. *Lipscomb* (Law Rep. 7 Eq. 501) and *De Rochefort* v. *Dawes* (Law Rep. 12 Eq. 540) considered and questioned. LEONINO *v.* LEONINO - - 460

**ADMINISTRATOR**—*Letters of Administration—Res Judicata.*] Letters of administration of the estate of an intestate were granted *ex parte* to the Defendant, as "his natural and lawful brother of the half blood." The Plaintiff, who was an uncle of the intestate, then commenced an action in the Chancery Division for the administration of the estate, alleging that the Defendant was illegitimate, and that he himself was next of kin; and moved for a receiver and an injunction:—*Held*, by *Lush*, J., that the application must be refused, for that as long as the letters of administration remained in force they were conclusive evidence that the Defendant was one of the next of kin, and that the Plaintiff's proper course of procedure was to apply in the Probate Division to have them recalled. *In re* IVORY. HANKIN *v.* TURNER 372

—— Lease and underlease - - - 743
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**APPARENT POSSESSION**—Bankruptcy—Bills of Sale Act - - - - 408
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—— Supreme Court—Fresh evidence - 579
*See* COMPANY. 5.

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**ARBITRATION**—Award—Set-off of action against costs - - - - - 676
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—— Partnership - - - - 185
*See* PARTNERSHIP. 1.

**ARREST**—*Defaulting Trustee—Writ of Attachment—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4—*Debtors Act*, 1874 (41 & 42 *Vict. c.* 54), *s.* 1.] The policy of the Debtors Acts, 1869 and 1878, in leaving a defaulting trustee exposed to the penalty of imprisonment is not vindictive; the object of the penalty is simply to produce payment of the money.—Where it is shewn that imprisonment of a defaulting trustee will not be productive of payment, the Court, in the exercise of the discretion given by the *Debtors Act*, 1878, will refuse an application for a writ of attachment. BARRETT *v.* HAMMOND - - - - - 285

2. —— 32 & 33 *Vict. c.* 62, *s.* 4—*Defaulting Trustee—Discretion of Court.*] Where a defaulting trustee deponed that he could not obey the order of the Court because he had no pecuniary means, the Court refused to make any order for his arrest under the *Debtors Act*. STREET *v.* HOPE - - - - - - 286, n.

**ASSIGNMENT OF DEBT**—*Equitable Assignment—Future Rent—Interest in Land—Parol Agreement for Loan—Statute of Frauds, s.* 4.] A customer, in July, borrowed £200 from his bankers upon the terms of a verbal agreement that the loan should be repaid out of the rent of a farm which would become due to him at Michaelmas. The money was advanced by the bankers, and the customer then gave them a letter addressed by him to the tenant of the farm, by which he authorized and requested the tenant, when his Michaelmas rent became due, to pay £200 to the bankers. The letter contained no reference to the loan, and did not shew that any consideration had been given for the authority. The bankers sent the letter to the tenant. The customer was adjudicated a bankrupt upon an act of bankruptcy committed in August:—*Held*, that as the rent was an interest in land, the agreement was one of which, by virtue of sect. 4 of the *Statute of Frauds*, could not be proved by parol evidence, and that therefore the letter could alone be looked at.—And, *held*, that the letter amounted only to a revocable authority to pay the rent to the bankers, and that it was revoked by the bankruptcy.—*Brice* v. *Bannister* (3 Q. B. D. 569) approved. *Ex parte* HALL. *In re* WHITTING - - C. A. 615

**ASSIGNMENT OF ALL DEBTOR'S PROPERTY**
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**ATTACHMENT**—Person - 285, 286, n.
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**BANKER** — Current account — Appropriation of payments - - - - 139
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**BANKRUPT** — Discharged — Taxation of bill of costs paid by trustee - - 388
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—— Undischarged—Possible surplus of estate
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**BANKRUPTCY**—*Act of Bankruptcy—Assignment of whole Property to secure pre-existing Debt—Equivalent — Forbearance by Grantee to enforce Judgment—Failure to prove alleged Fraud—Costs—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 87.] A trader on the 28th of August executed a bill of sale of substantially the whole of his property to secure a debt for which the grantee had recovered judgment on the 3rd of July, and another debt which he owed the grantee. The grantor had on the 4th of July written a letter to the grantee, undertaking, in the event of his not issuing execution on the judgment, to execute to him on demand a bill of sale to secure the judgment debt and such other sums as he owed him. The grantee did not enter into any agreement not to enforce the judgment, but in fact he did not issue execution. On the 29th of August another creditor levied execution at the grantor's place of business, and on the 1st of September the grantor filed a liquidation petition. He had between the 4th of July and the 29th of August received by the carrying on of his business sums amounting to £10,000:—*Held*, that no equivalent had been given for the bill of sale, and that it was void as against the trustee in the liquidation.—*Woodhouse* v. *Murray* (Law Rep. 2 Q. B. 634; Ibid. 4 Q. B. 27) followed.—*Philips* v. *Hornstedt* (1 Ex. D. 62) disapproved.—An Appellant who had failed in proving allegations of fraud, as to which he had adduced a mass of evidence, but who had succeeded on a point of law, was deprived of his costs. *Ex parte* COOPER. *In re* BAUM - C. A. 313

2. —— *Adjudication of Bankruptcy—Rights of Third Person—Act of Bankruptcy — Relation back of Trustee's Title — Bill of Sale Holder—Appeal—"Person aggrieved"—Limit of Time for appealing—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 8, 10, 11, 71—*Bankruptcy Rules*, 1870, *r.* 143.] By virtue of sects. 10 and 11 of the *Bankruptcy Act*, 1869, an adjudication of bankruptcy is, so long as it stands, conclusive as against a third person; *e.g.*, the holder of a bill of sale executed by the bankrupt, that the act of bankruptcy, on which the adjudication was professedly founded, was in fact committed, and that the title of the trustee relates back to that act of bankruptcy.—But a third person, whose title to property is affected by the adjudication, is under sect. 71 a "person aggrieved" by it, and is entitled to appeal from it.—Whether the limit of twenty-one days for bringing an appeal, fixed by rule 143 of the Bankruptcy Rules, 1870, applies to a third person, *quære*.—Decision of *Bacon*, C.J., reversed.—Leave was given to appeal to the House of Lords. *Ex parte* LEAROYD. *In re* FOULDS [C. A. 3

3. —— *Annulling Adjudication—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 28—*Subsequent Discovery of concealed Property of Bankrupt—Discharge of Annulling Order—Rights of Creditors.*]

**BANKRUPTCY**—*continued.*

One of the creditors of a bankrupt held two bills of sale of his chattels. Objections had been raised by the trustee to the validity and extent of the security, though no steps had been taken to set it aside. Ultimately, the mortgagee offered to pay £620 to the trustee. A meeting of the creditors was held, under sect. 28 of the *Bankruptcy Act*, 1869, when it was resolved to accept the mortgagee's offer, that the bankruptcy should be thereupon annulled; and that the mortgagee should release his claim on the bankrupt's estate, and the bills of sale should not be disputed by the trustee. The resolutions were approved by the Court, and, upon the trustee certifying that the terms of them had been completed to his satisfaction, an order was made annulling the bankruptcy. The £620 was divided among the creditors other than the mortgagee. The mortgagee realized his security, but did not obtain enough to pay his debt in full. Six years afterwards it was discovered that the bankrupt had concealed a reversionary interest to which he was entitled at the date of his adjudication, and an order was obtained discharging the annulling order, and directing that the bankruptcy should proceed as if that order had not been made. The trustee then received the reversionary interest, which had fallen into possession:—*Held* (reversing the decision of *Bacon*, C.J.), that the mortgagee, equally with the other creditors, was remitted to his original rights, and was entitled to prove for the unpaid balance of his debt. *Ex parte* Jarvis. *In re* Spanton - - **C. A. 179**

4. —— *Debtor's Summons — Application to dismiss — Security — Married Woman — Separate Trading — Liability of Husband—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 7.] A married woman carried on in her maiden name a millinery business separately from her husband. A debtor's summons was issued against the husband and wife, claiming the payment of a sum due upon some bills of exchange drawn by the summoning creditor upon and accepted by the wife in her maiden name, and dishonoured. The husband applied to the Court to dismiss the summons. He deposed that he never authorized his wife to pledge his credit, and that five years previously he had given notice to the summoning creditor that he had nothing to do with his wife's business. On this evidence, which was uncontradicted, the Registrar made the common order staying the proceedings on security being given by the husband:—*Held*, that on the evidence the husband was not liable for the debt; that the issuing of the summons was an abuse of the procedure; and that the summons must be dismissed with costs. *Ex parte* Shepherd. *In re* Shepherd - - - - **C. A. 573**

5. —— *Execution against Trader — Liquidation Petition—Injunction to restrain Sale—Debt above £50—Possession Money — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 87.] In determining whether the amount for which an execution is to be levied exceeds £50, possession money may be taken into account even after an injunction has been granted restraining the sheriff from selling the goods. *Ex parte* Lithgow. *In re* Fenton **169**

6. —— *Contract for Sale of Goods on Credit—Bankruptcy of Purchaser before Delivery—Right of Vendor to resell—Right of Trustee to complete*

**BANKRUPTCY**—*continued.*

*on paying Cash—Proof in Bankruptcy for Deficiency on Resale—Costs of Appeal—Trustee in Bankruptcy Respondent.*] When the purchaser of goods sold on credit becomes bankrupt before the vendor has parted with the possession of the goods, the trustee in the bankruptcy has a right to elect to complete the contract by paying the agreed price in cash within a reasonable time. But, if he does not do so, the vendor is entitled to treat the contract as broken, and to resell the goods, without first tendering them to the trustee. —And the vendor is entitled to prove in the bankruptcy for damages for the breach of contract, the measure of damages, if the market is falling, being the difference between the contract price and the price obtained on the resale.—*Semble*, that a sub-purchaser from the bankrupt would also be entitled to an option to complete the original contract on tendering the agreed price in cash within a reasonable time.—A trustee in bankruptcy who is respondent to a successful appeal will not be ordered to pay costs personally. *Ex parte* Stapleton. *In re* Nathan **C. A. 586**

7. —— *Disclaimer by Trustee—Leasehold Interest of Bankrupt—Previous Severance of Tenant's Fixtures—Rights of Landlord—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 125.] The effect of a disclaimer by the trustee in a liquidation of a lease vested in the debtor is to place the trustee in the position of never having had any estate in the leasehold property.—Consequently, any severance by the trustee of the fixtures attached to the property after the date at which the term is put an end to by the disclaimer, *i.e.*, the date of the trustee's appointment, is necessarily a wrongful act, and gives the landlord a right to recover the value of the fixtures from the trustee.—Decision of *Bacon*, C.J., reversed.—Whether, after severing the fixtures, the trustee has any right to disclaim the lease, *quære*.—But at any rate he cannot as against the landlord assert the invalidity of his own disclaimer. *Ex parte* Brook. *In re* Roberts [**C. A. 100**

8. —— *Jurisdiction — Foreclosure — Sale of Mortgaged Property of Bankrupt — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 65, 72—*Bankruptcy Rules*, 1870, *r.* 78.] An order having been made by the Court of Bankruptcy foreclosing the trustee of a bankrupt in respect of leasehold property mortgaged by the bankrupt, six months being allowed for redemption, the mortgagee appealed, insisting that, as the trustee had admitted that he had no assets of the bankrupt other than the equity of redemption of the mortgaged property, only one month ought to be allowed for redemption:—*Held*, that the trustee was entitled to six months in which to redeem:—*Held* also, that, no application having been made by the mortgagee to the Registrar for a sale of the property under rule 78 of the Bankruptcy Rules, 1870, an order for sale could not be made on the appeal without the consent of the trustee. —Observations on the jurisdiction of the Court of Bankruptcy with regard to foreclosure. *Ex parte* Fletcher. *In re* Hart - - **C. A. 610**

9. —— *Jurisdiction—London Court of Bankruptcy — Interpleader Order — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 65.] Where goods

**BANKRUPTCY**—*continued.*

seized by a sheriff under a writ of *fi. fa.* issued by the *London* Court of Bankruptcy are claimed adversely, that Court has jurisdiction, on the application of the sheriff, to make an interpleader order.—Sect. 65 confers on the *London* Court of Bankruptcy, for the purposes of the *Bankruptcy Act*, all the jurisdiction formerly possessed by the Superior Courts of Common Law. *Ex parte* Sheriff of Middlesex. *In re* Buck C. A. 575

10. —— *Jurisdiction—Money Demand by Trustee against Stranger to Bankruptcy — Mutual Accounts—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 72.] A liquidating creditor had consigned goods to commission merchants for sale, and they had made advances to him. They alleged that a balance was due to them from his estate, and the trustee in the liquidation alleged that a balance was due from them to the estate. They had not, however, tendered any proof or made any formal claim against the estate:—*Held*, by the Chief Judge and by the Court of Appeal, that, inasmuch as, if the trustee was right, there was a mere money demand by him against a stranger to the liquidation, the Court of Bankruptcy ought not, on the application of the trustee, to order accounts to be taken of the dealings between the debtor and the commission merchants; but that the trustee ought to proceed by action in the High Court.—*Ex parte Dickin* (8 Ch. D. 377) followed. *Ex parte* Musgrave. *In re* Wood - - 94

11. —— *Liquidation Petition—Lunatic—Next Friend—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 65, 125—*Bankruptcy Rules*, 1870, *rr.* 7, 252—*Bankruptcy Forms*, 1870, *No.* 106.] A liquidation petition cannot be signed by a next friend on behalf of a lunatic not so found by inquisition.—*Semble*, that, in the case of a lunatic so found by inquisition, the Court of Lunacy might have jurisdiction to direct that a liquidation petition should be signed on his behalf. *Ex parte* Cahen. *In re* Cahen - - - - C. A. 183

12. —— *Order and Disposition—Bill of Sale—Construction—Power to Grantor to take Possession on happening of any one of certain Events—Subsequent Proviso that Grantor shall retain Possession until Default in Payment—Reputed Ownership—Friendly Possession—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.] A bill of sale of chattels empowered the grantee to take possession in case (*inter alia*) the grantor should become embarrassed in his affairs, or in case any action at law should be commenced against him. There was a subsequent proviso that, until default should be made in payment, according to the covenant and proviso therein contained, it should be lawful for the grantor to retain possession:—*Held*, by the Court of Appeal (reversing the decision of *Bacon*, C.J.), that the prior clause was not controlled by the subsequent proviso, but that on the happening of one of the specified events, the grantee was entitled to take possession, though no default in payment had been made by the grantor.—In order to exclude the operation of the reputed ownership clause, a real possession, even though it be friendly, is sufficient.—But, to satisfy the *Bills of Sale Act*, the possession must be apparent as well as real. *Ex parte* National Guardian Assurance Company. *In re* Francis - - C. A. 408

**BANKRUPTCY**—*continued.*

13. —— *Order and Disposition — Reputed Ownership — Agency — Notice — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.] Goods were consigned by manufacturers under an agreement which, in the opinion of the Court, made the consignees, not purchasers of the goods, but agents of the manufacturers for their sale. The agents described themselves, upon a brass plate which was affixed at their place of business, and also upon the invoices which they used, as "merchants and manufacturers' agents." They acted as agents in the same way for several other manufacturers:—*Held*, that the creditors of the agents had notice of the agency sufficient to exclude the operation of the reputed ownership clause, and the trustee in their liquidation was ordered to deliver up to the manufacturers goods of theirs which were in the possession of the agents, in specie, at the commencement of their liquidation, and to pay over to the manufacturers the proceeds of the sale of their goods which had been sold. *Ex parte* Bright. *In re* Smith - C. A. 566

14. —— *Order and Disposition — Reputed Ownership—Goods sent on Sale or Return—Notorious Trade Custom—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.] In order that goods of another person in the possession of a bankrupt should pass to his trustee under the latter words of sub-sect. 5 of sect. 15 of the *Bankruptcy Act*, 1869—as goods of which the bankrupt "has taken upon himself the sale or disposition as owner"—it is necessary that the bankrupt should have been the reputed owner of the goods.—The effect of a notorious trade custom in excluding the operation of the reputed ownership clause, considered. *Ex parte* Wingfield. *In re* Florence - - - - C. A. 591

15. —— *Prerogative of Crown — Extent — Liquidation Petition—Appointment of Receiver—Relation back of Trustee's Title—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 11, 13, 32, 49, 65, 72, 125—*Bankruptcy Rules*, 1870, *rr.* 260, 262.] Though the Crown is named in some of the sections of the *Bankruptcy Act*, 1869, it is not bound by the other provisions of the Act.—In particular, the relation back of the title of the trustee in a liquidation to the filing of the petition does not affect the rights of the Crown under an extent issued against the property of the debtor between the filing of the petition and the appointment of a trustee.—Notwithstanding the filing of a liquidation petition and the appointment of a receiver by the Court on the application of the debtor, his property remains vested in him as before, until the creditors have determined what they will do, and the property is bound by an extent issued by the Crown between the filing of the petition and the appointment of a trustee. *Ex parte* Postmaster-General. *In re* Bonham - C. A. 595

16. —— *Proof—Debt arising out of a Felony —Failure to prosecute Felon—Rights of Trustee in Bankruptcy of injured Person.*] *Per James* and *Bramwell*, L.JJ.:—Even if a person injured by a felony is debarred from proving in the bankruptcy of the felon in respect of the injury until he has prosecuted the felon, the obligation to prosecute does not extend to his trustee in bankruptcy, even though that bankruptcy occurred after a proof in

**BANKRUPTCY**—*continued.*

respect of the injury had been tendered by the injured person himself. Under such circumstances the proof ought to be admitted in favour of the trustee.—Whether a voluntary assignee of the injured person would be relieved from the obligation, *quære.*—*Per Baggallay*, L.J.:—A person who has been injured by a felony is not allowed by the policy of the law to seek civil redress, if he has failed in his duty of bringing or endeavouring to bring the felon to justice.—But this rule does not apply where the offender has been brought to justice at the instance of some other person injured by a similar offence, or where prosecution is impossible by reason of the death of the offender, or where he has escaped from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence.—And the executors or administrators of the injured person, or his trustee in bankruptcy, can stand in no better position than he himself was in at the date of his death or of the commencement of his bankruptcy. *Ex parte* Ball. *In re* Shepherd - - - **C. A. 667**

**17.** —— *Proof—Secured Creditor—Vote in respect of whole Debt—Abandonment of Security—Dissolution of Partnership—Assignment of retiring Partner's Interest—Conversion of Assets—Bankruptcy Act*, 1869 (32 & 33 *Vict.* c. 71), *ss.* 16, 40—*Bankruptcy Rules*, 1870, *r.* 272—*Bankruptcy Forms*, 1870, *No.* 32.] Whether a secured creditor, who in his proof states his security, and afterwards votes at a liquidation meeting in respect of his whole debt, thereby abandons his security, *quære*.—An agreement for the dissolution of a partnership between two traders provided that the balance due to the retiring partner should be paid partly by an immediate cash payment, and partly by weekly instalments, and the continuing partner agreed to enter into a personal bond conditioned for carrying out the terms of the agreement:—*Held*, that the agreement was an executory one, and that, at any rate till the cash payment had been made and the bond had been given, the assets of the business remained joint assets, and the retiring partner was, subject to the payment of the debts due to the joint creditors, entitled to a lien upon the assets in respect of what remained due to him under the agreement. *Ex parte* Wood. *In re* Wright **C. A. 554**

**18.** —— *Prosecution of Fraudulent Debtor—Liquidation—Order nunc pro tunc—Costs of Prosecution—Debtors Act*, 1869, *s.* 11, *sub-s.* 4, *and ss.* 16, 17.] An order to the trustee to prosecute for offences under the *Debtors Act*, 1869, s. 11, sub-s. 4, having been refused, and the debtors having, subsequently to such refusal, been prosecuted by the trustee and convicted of offences under this section:—*Held*, that under the circumstances the order to prosecute ought to have been made in the first instance, and that the trustee was now entitled to an order to prosecute *nunc pro tunc*, in order to recover the costs of the prosecution. Costs of the appeal out of the estate. *In re* Stanlake & Son. *Ex parte* Priestley - - - - - **774**

**19.** —— *Undischarged Bankrupt—Interest in possible Surplus of Estate—Mortgagee of Surplus—Examination of alleged Creditor—Bankruptcy Rules*, 1870, *r.* 166.] A trustee in bankruptcy is not a trustee of the surplus of the estate for the bankrupt.—The bankrupt, while undischarged, has no interest in the surplus beyond a mere hope or expectation, and he cannot, by assigning the surplus by way of security, give to his assignee any right to interfere in the administration of the estate, as, for instance, by examining an alleged creditor with respect to his claim. *Ex parte* Sheffield. *In re* Austin - - **C. A. 434**

**20.** —— *Undischarged Bankrupt Debtor—Close of Bankruptcy—Property acquired by Bankrupt Debtor after close of Bankruptcy—Rights of Creditors—Bankruptcy Act*, 1869, *s.* 54—*Bankruptcy Rules*, 1870, *r.* 183—*Forms in Schedule to Bankruptcy Rules*, 1870, *No.* 70—*Practice.*] After the close on the 1st of December, 1874, of a bankruptcy, the debtor, who had been made bankrupt, became entitled, under the will of a testatrix who died in 1875, and under a decree dated the 8th of January, 1878, in a suit for the administration of her estate, to property amounting to about £20,000. During the three years which elapsed after the close of the bankruptcy, the debtor did not pay 10*s.* in the pound, and he had not obtained an order of discharge.—On the 26th of February, 1878, a creditor, whose name and debt appeared in the bankrupt's statement of affairs, but who had not proved before the close of the bankruptcy, sent in a proof for his debt to the Registrar, who had become the trustee:—*Held*, that the proof was good, and that the creditor, notwithstanding that his debt was not proved before the close of the bankruptcy, was entitled to apply for leave to enforce payment of his debt as a judgment debt against the property of the debtor, under sub-s. 2 of sect. 54 of the *Bankruptcy Act*, 1869.—Upon the granting of an application for the sanction of the Court, as required by sub-sect. 2 of sect. 54 of the *Bankruptcy Act*, 1869, a notice must be inserted in the *Gazette*, as prescribed by Form 70 in the Schedule to the Bankruptcy Rules, 1870. *Ex parte* Lancaster Banking Corporation. *In re* Westby - - - - - - **776**

—— Forfeiture clause in will - - **157**
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*See* Lunatic. 2.

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—— Registration - - - 26, 313, 398
*See* BILLS OF SALE ACT. 1, 2, 3.

**BILLS OF SALE ACT**—*Registration—Inventory of Goods with Receipt for Purchase-money—Contemporaneous Agreement by Purchaser to let the Goods to Vendor*—17 & 18 *Vict. c.* 36), *ss.* 1, 2, 7.] *C.*, on the 18th of July, advanced *W.*, who had then an execution in his house, £150, which was employed partly in paying out the execution. An inventory was made of *W.'s* furniture, and at the foot of it *W.* signed a receipt for the £150, as "for the absolute sale" to *C.* "of the abovementioned articles." On the same day a written agreement was entered into between *C.* and *W.* for the letting of the same furniture (specified in a schedule) by *C.* to *W.* for two months for £170, to be paid by *W.* to *C.* on the 18th of September, or such other time as might be agreed on. The agreement gave *C.* power, in case the £170 should not be duly paid, or if at any time during the continuance of the agreement the goods should be taken under an execution or distress, or *W.* should become bankrupt or take proceedings for liquidation of his affairs or composition, or on the happening of some other specified events, to determine the agreement, and thereupon to take possession of the goods and to sell them. If upon a sale he should realize more than what was due to him under the agreement and his expenses, he was to pay the surplus to *W.*; if he should realize less, *W.* was to make good the deficiency. On the payment of the £170 and expenses the goods were to become the property of *W.*:—*Held*, that these two documents together constituted a mortgage to secure £170, and that they required registration under the *Bills of Sale Act*, 1854.—*Thomson* v. *Barrett* (1 L. T. (N.S.) 268), *Allsopp* v. *Day* (7 H. & N. 457), and *Byerley* v. *Prevost* (Law Rep, 6 C. P. 144), discussed and distinguished.—In August *W.* repaid *C.* £50, part of the £170. The balance of £120 was not paid when it became due on the 18th of September, and *C.* sent *H.* to take possession of the goods. Possession was taken, and it was then arranged that *H.* should pay the £120 to *C.* *C.* signed a receipt (indorsed on the hiring agreement of the 18th of July) and dated the 22nd of September, for the £120 as "for the absolute sale" to *H.* of "the goods herein specified," and on the same day an agreement (similar to that of the 18th of July) was entered into between *H.* and *W.* for the letting of the furniture to *W.* for three months at a rent of £145, to be paid in three instalments in October, November, and December. The October instalment was not paid when it became due, and on the 6th of November *H.* took formal possession of the goods. But the goods remained in the apparent possession of *W.* until after he had committed an act of bankruptcy, upon which he was ultimately adjudicated a bankrupt. None of the documents was registered under the *Bills of Sale Act*:—*Held*, that, whether the transaction in September was a transfer to *H.* of *C.'s* interest as a mortgagee or an entirely new transaction, *H.* could stand in no better position than *C.* did, and that the trustee in the bankruptcy was entitled to the goods. *Ex parte* ODELL. *In re* WALDEN [C. A. 76

**BILLS OF SALE ACT**—*continued.*

2. —— *Registration—Inventory of Goods with Receipt for Purchase-money attached*—17 & 18 *Vict. c.* 36, *ss.* 1, 7.] An inventory of goods with receipt for purchase-money attached, the vendor remaining in apparent possession of the goods, is a bill of sale within the meaning of the *Bills of Sale Act*, 1854, and requires registration.—*Allsopp* v. *Day* (7 H. & N. 457) distinguished.—*Byerley* v. *Prevost* (Law Rep. 6 C. P. 144) disapproved. *Ex parte* COOPER. *In re* BAUM - - C. A. 313

3. —— *Registration—Residence of Grantor—Misdescription*—17 & 18 *Vict. c.* 36, *ss.* 1, 3.] A farmer, whose real name was *Joseph Wood*, but who had assumed the name of *Joseph Albert Wood*, and had become known to his creditors by that name, executed a bill of sale in which he was described as "*Joseph Wood*, of *Lache Hall Farm*, in the county of *Chester*, farmer." The same name and description were given in the affidavit filed on the registration of the bill of sale. *Lache Hall Farm* was situate a short distance outside *Chester*, but was really within the county of the city of *Chester*, not in the county of *Chester*. It did not appear that there was any other farm of the same name in the county of *Chester*:—*Held*, by the Chief Judge and by the Court of Appeal, that the registration was valid.—*Hewer* v. *Cox* (3 E. & E. 428) followed.—*Murray* v. *Mackenzie* (Law Rep. 10 C. P. 625) distinguished. *Ex parte* M'HATTIE. *In re* WOOD - - C. A. 398

**BOND**—Lands Clauses Act - - - 131
*See* LANDS CLAUSES ACT.
**BOROUGH FUND**—Expense of opposing bill in Parliament - - - - 204
*See* MUNICIPAL CORPORATION.

**CASES**—*Allsopp* v. *Day* (7 H. & N. 457) considered
*See* BILLS OF SALE ACT. 1, 2. [76, 313
—— *Andress' Case* (8 Ch. D. 126) distinguished
*See* COMPANY. 4. [720
—— *Anglo-Italian Bank* v. *Davies* (9 Ch. D.) followed - - - - 153
*See* PRACTICE. 18.
—— *Attorney-General* v. *Corporation of Wigan* (5 D. M. & G. 52) considered - 204
*See* MUNICIPAL CORPORATION.
—— *Brice* v. *Bannister* (3 Q. B. 569) approved
*See* ASSIGNMENT OF DEBT. [615
—— *Bright* v. *North* (2 Ph. 216) considered 204
*See* MUNICIPAL CORPORATION.
—— *Byerley* v. *Prevost* (Law Rep. 6 C. P. 144) considered - - - 76, 313
*See* BILLS OF SALE ACT. 1, 2.
—— *Clements* v. *Welles* (Law Rep. 1 Eq. 200) distinguished - - - - 747
*See* COVENANT. 2.
—— *De Rochfort* v. *Dawes* (Law Rep. 12 Eq. 540) questioned - - - - 460
*See* ADMINISTRATION. 7.

**CASES**—*continued.*

—— *Dickin, Ex parte* (8 Ch .D. 377), followed **94**
*See* BANKRUPTCY. 10.

—— *Garnett* v. *Bradley* (3 App. Cas. 944) followed - - - - **481**
*See* PRACTICE. 14.

—— *Gowan* v. *Broughton* (Law Rep. 19 Eq. 79) explained - - - - **40**
*See* ADMINISTRATION. 2.

—— *Herrick* v. *Franklin* (Law Rep. 6 Eq. 593) explained - - - - **146**
*See* WILL. 8.

—— *Hewer* v. *Cox* (3 E. & E. 428) followed **398**
*See* BILLS OF SALE ACT. 3.

—— *Krehl* v. *Burrell* (10 Ch. D. 420) explained
*See* PRACTICE. 11. [**432**

—— *Laker* v. *Hordern* (1 Ch. D. 644) considered
*See* WILL. 6. [**236**

—— *Lipscomb* v. *Lipscomb* (Law Rep. 7 Eq. 501) questioned - - - - **460**
*See* ADMINISTRATION. 7.

—— *Lloyd* v. *Lloyd* (Law Rep. 1 Eq. 372) followed - - - - **157**
*See* WILL. 2.

—— *Miller* v. *Miller* (Law Rep. 8 Eq. 499) dissented from - - - - **31**
*See* LIMITATIONS, STATUTE OF.

—— *Minchin* v. *Minchin* (3 Ir. Ch. Rep. 167) disapproved - - - - **484**
*See* POWER.

—— *Mounsey* v. *Blamire* (4 Russ. 384) disapproved
*See* WILL. 3. [**113**

—— *Murray* v. *Mackenzie* (Law Rep. 10 C. P. 625) distinguished - - - **398**
*See* BILLS OF SALE ACT. 3.

—— *Norton* v. *Florence Land and Public Works Company* (7 Ch. D. 332) overruled **530**
*See* COMPANY. 1.

—— *Pagin & Gill's Case* (8 Ch. D. 126) distinguished - - - - **720**
*See* COMPANY. 4.

—— *Parnham's Trusts, In re* (Law Rep. 13 Eq. 413), followed - - - **157**
*See* WILL. 2.

—— *Peek* v. *Gurney* (Law Rep. 6 H. L. 377) explained - - - - **502**
*See* COMPANY. 2.

—— *Philips* v. *Hornstedt* (1 Ex. D. 62) disapproved
*See* BANKRUPTCY. 1. [**313**

—— *Price* v. *Jenkins* (5 Ch. D. 619) distinguished
*See* VOLUNTARY SETTLEMENT. [**622**

—— *Reg.* v. *Mayor of Sheffield* (Law Rep. 6 Q. B. 652) considered - - - **204**
*See* MUNICIPAL CORPORATION.

—— *Reynolds* v. *Godlee* (Joh. 536, 582) overruled
*See* ADMINISTRATION. 6. [**172**

—— *Sayre* v. *Hughes* (Law Rep. 5 Eq. 376) considered - - - - **474**
*See* INFANT. 1.

—— *Scott* v. *Cumberland* (Law Rep. 18 Eq. 578) explained - - - - **40**
*See* ADMINISTRATION. 2.

—— *Snell, In re* (6 Ch. D. 105), followed - **729**
*See* SOLICITOR. 2.

**CASES**—*continued.*

—— *Spargo's Case* (Law Rep. 8 Ch. 407) followed
*See* COMPANY. 4.

—— *Stourton* v. *Stourton* (8 D. M. & G. 760) considered - - - - **49**
*See* INFANT. 3.

—— *Thomson* v. *Barrett* (1 L. T. (N.S.) 268) explained - - - - **76**
*See* BILLS OF SALE ACT. 1.

—— *Waterhouse* v. *Jamieson* (Law Rep. 2 H. L., Sc. 32) approved - - - **118**
*See* COMPANY. 7.

—— *Weir* v. *Barnett* (3 Ex. D. 32) followed **502**
*See* COMPANY. 2.

—— *White* v. *Chitty* (Law Rep. 1 Eq. 372) followed - - - - **157**
*See* WILL. 2.

—— *Williams, Ex parte* (7 Ch. D. 138), distinguished - - - - **335**
*See* COMPANY. 8.

—— *Woodhouse* v. *Murray* (Law Rep. 4 Q. B. 27) followed - - - - **313**
*See* BANKRUPTCY. 1.

**CESTUI QUE VIE**—Production of - - **166**
*See* TENANT FOR LIFE.

**CHANCERY FUNDS ORDER, 1874, r. 5** - **664**
*See* TRUSTEE RELIEF ACT. 1.

**CHILDREN**—Born after testator's death - **25**
*See* WILL. 4.

—— Who shall attain twenty-five - - **264**
*See* WILL. 7.

**CLASS**—Gift to a - - - **25, 264**
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**CLOSE OF BANKRUPTCY** - - - **776**
*See* BANKRUPTCY. 20.

**COMPANY**—*Debentures—Bond binding the Estate, Property, and Effects of the Company.*] The articles of a company incorporated for the purpose of acquiring land in *Florence* and building thereon, and selling, mortgaging, or leasing the same, gave power to the directors to borrow money by mortgage of any part of the company's property, or by "bonds, debentures, or mortgage debentures," which should entitle the holders to be paid out of the moneys, property, and effects of the company *pari passu*.—The company issued instruments called "obligations," which were expressed to be made under the power of their articles, by which they bound "themselves, their successors, and assigns, and all their estate, property, and effects," to repay the sums mentioned therein at a future date, with power to redeem a certain portion of the obligations at intermediate times:—*Held*, that, reading the obligations with reference to the articles of association, they constituted a charge on the property of the company, subject to the power of the directors to dispose of any part of such property in the ordinary course of their business.—*Per James*, L.J.:—Upon the construction of the obligations themselves, without reference to the articles, except as to whether they were *ultrà vires*, there was sufficient to constitute a charge upon the property of the company.—Whether the *Judicature Act*, 1873, s. 10, has affected the power of companies to charge their

**COMPANY**—*continued.*

after-acquired property as against the other creditors of the company. *quære.*—The decision of *Hall*, V.C. (following *Norton* v. *Florence Land and Public Works Company* (7 Ch. D. 332)) reversed. *In re* Florence Land and Public Works Company. *Ex parte* Moor - **C. A. 530**

2. ——*Fraudulent Prospectus—Principal and Agent—Liability of Agent for Fraud of Co-agent—Directors—Liability of Director for Fraud of Co-director—Amendment of Pleadings—Action by Shareholder to rescind Contract to take Shares—Winding-up Petition—Appearance of Plaintiff as Contributory on hearing of Petition—Election to claim Rescission in the Winding-up Proceedings—Companies Act*, 1862, *s.* 74—*Rules of Court*, 1875, *Order* XXVII., *r.* 1.] A director of a company is not liable for a fraud (such as the issue of a fraudulent prospectus of the company) committed by his co-directors or by any other agent of the company, unless he has either expressly authorized or tacitly permitted its commission.—*Peek* v. *Gurney* (Law Rep. 6 H. L. 377) explained.—*Weir* v. *Barnett* (3 Ex. D. 32) followed.—On the 22nd of November a shareholder in a company commenced an action against the company and its directors. By the indorsement on the writ he claimed to have the allotment of shares to him cancelled, on the ground that he had been induced to take the shares by the fraudulent misrepresentations of the Defendants; and that the Defendants might be declared jointly and severally liable to repay him what he had paid for the shares and to indemnify him against any further liability. On the 29th of November a petition was presented to wind up the company. On the 18th of December the petition was heard, and a winding-up order was made, the Plaintiff then appearing as a contributory to support the petition, and the order providing for the payment of his costs in that character. On the 3rd of April the Plaintiff delivered a statement of claim in the action, by which he claimed the same relief as that which he had claimed by the indorsement on the writ, with this exception, that he did not expressly ask that the allotment of shares might be cancelled. There was a claim for further or other relief. After this the liquidator applied in the winding-up to put the Plaintiff on the list of contributories; the Plaintiff resisted the application, and it was ordered to stand over until after the trial of the action:—*Held*, that on the pleadings as they stood the Plaintiff could not claim the rescission of his contract to take the shares.—And leave to amend the statement of claim was refused, on the ground that by his conduct the Plaintiff had elected to claim the rescission of the contract, not in the action, but in the winding-up.—*Semble*, that, the Plaintiff not having claimed rescission of the contract, he could not have any other relief in the action as against the company. Cargill *v.* Bower - - - - - - **502**

3. ——*Winding-up—Appointment of Official Liquidator—Creditors.*] An official liquidator had been appointed in Chambers. Upon motion made on behalf of a very large majority of the unsecured creditors of the company, who alone were interested in the realization of the assets, two creditors were appointed liquidators instead of the liquidator already appointed. *In re* Association of Land Financiers - - **269**

**COMPANY**—*continued.*

4. ——*Winding-up—Fully paid-up Shares—Payment in Cash—Allotment in Consideration of Services rendered—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] The proprietor of a newspaper agreed with a company to insert for them a series of advertisements in his newspaper, and to accept fully paid-up shares of the company in payment of his account for so doing. He inserted the advertisements, and sent his account to the company. The company accepted the account, and subsequently allotted to him fully paid-up shares to amount thereof. The contract was not registered in pursuance of the *Companies Act*, 1867, s. 25, and the company was afterwards wound up:—*Held*, that as the services contracted for had been actually rendered before the shares were allotted, there was at the time of the allotment a debt payable in money by the company to the allottee, in respect of which he could have sustained a plea of payment in an action by the company for calls, and, therefore, that the shares allotted must be treated as having been paid for in cash within the principle of *Spargo's Case* (Law Rep. 8 Ch. 407).—The newspaper proprietor also, in pursuance of a similar agreement with the same company, inserted further advertisements in respect of which no allotment of shares had been made to him at the commencement of the winding-up:—*Held*, that he was entitled to prove in the winding-up for the amount due to him for such further advertisements.—*Pagin & Gill's Case* (6 Ch. D. 681) and *Andress' Case* (8 Ch. D. 126) distinguished. *In re* Government Security Fire Insurance Company. White's Case - **720**

5. ——*Winding-up—Director—Misfeasance—Purchase of Vendor's fully paid-up shares at a Discount—Onus of proving when Purchase was made—Admission of further Evidence on Appeal—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 165—*Rules of Court*, 1875, *Order* LVIII., *r.* 5.] The articles of association of a company authorized the directors to carry out an agreement which had been previously entered into for the purchase of a mine upon the terms of 5000 fully paid-up shares of the nominal value of £2 each being allotted to the vendor, his nominee or nominees, as the purchase-money. The agreement was registered under the provisions of sect. 25 of the *Companies Act*, 1867. The directors, at their first meeting after the registration of the company, adopted the agreement, by resolving that, in accordance with it, 5000 fully paid-up shares should be allotted to the vendor and his nominees. Of the 5000 shares, 500 were, on the nomination of the vendor, allotted to *W.*, one of the directors, who was present at the meeting.—In the subsequent winding-up of the company, the liquidator applied to the Court, under sect. 165 of the *Companies Act*, 1862, for an order that *W.* should pay the nominal value of the 500 shares. In answer to the application *W.* deposed that he purchased the 500 shares from the vendor in the regular way of business, paying him £500 for them, which was at the time considered their full value. He did not, however, say when the purchase was made. A share dealer deposed that, at the time

COMPANY—*continued.*

when the contract was adopted, there was no market for the shares of the company, and that £1 per share was a large price to pay for them. The books of the company shewed that at that time a number of shares were allotted (some to the directors themselves, including *W.*) on the terms of payment in cash of the par value. There was no other evidence. When the application was made to the Court the vendor was dead:—*Held*, that the onus of proving whether the purchase of the 500 shares was made before or after the directors had adopted the agreement lay upon *W.*, and that in the absence of evidence to the contrary it must be taken to have been made before the adoption of the agreement:—*Held*, therefore, that *W.* had in effect received from the vendor a bribe to the amount of the value of the shares beyond the sum which he had paid for them, which made it his interest to adopt the agreement, and prevented him from exercising an unbiassed judgment on behalf of the company, and that he must contribute to the assets of the company the value of the shares, less the £500 which he had paid for them:—*Held*, also, that, under the circumstances, the value of the shares must be taken to have been the nominal par value:—*Held*, also, that *W.*, being the only living person who was acquainted with the transaction, could not be allowed on the hearing of the appeal to give his own oral testimony to prove that he purchased the shares after the agreement had been adopted by the directors. *In re* West Jewell Tin Mining Company. Weston's Case - - - C. A. 579

6. —— *Winding-up — Director, Liability of, for alleged Misfeasance—Companies Act*, 1862, *s.* 165—*Promotion Money.*] Upon the formation of a company promotion money had been improperly paid, of which *B.* was cognizant though not a party thereto. *B.* subsequently became a director, but took no steps to recover the money for the company. — The company was now being wound up. On a summons by the liquidator to make *B.* liable under the above circumstances:—*Held*, that *B.* was not liable for wilful default or for misfeasance under sect. 165 of the *Companies Act*, 1862. *In re* Forest of Dean Coal Mining Company - - - - - - 450

7. —— *Winding-up — Liquidator — Summons by—His Position and Powers—Companies Act*, 1862, *s.* 165—*Companies Act.* 1867, *s.* 27—*Share Warrants to Bearer — Paying Interest out of Capital—Assent of Company—Liability of Directors.*] The powers of a liquidator of a limited company are more extensive than those of the company prior to the winding-up order: for instance, he can assert as against the members of the company rights which the company itself could not have asserted. — *Dictum* of Lord *Hatherley* in *Waterhouse* v. *Jamieson* (Law Rep. 2 H. L., Sc. 32) approved of.—Under sect. 165 of the *Companies Act*, 1862, either the liquidator, or a creditor, or a contributory of a limited company in course of being wound up, may apply to the Court for an order to compel a director to repay moneys of the company misapplied by him; and if the liquidator makes such an application, it is unnecessary to consider whether he does so as representing the company or as representing the

COMPANY—*continued.*

creditors, he having, upon the literal construction of the section, an independent right to apply in a proper case.—The creditors of a limited company are entitled, by virtue of a contract between themselves and the company, to be implied if not expressed, to have the capital of the company reserved for payment of their claims; consequently, the repayment by the directors to the shareholders of the whole or any part of the capital, either in the form of interest on share warrants issued under the *Companies Act*, 1867, s. 27, or otherwise, and whether such repayment be made with the sanction of the shareholders or not, is, unless such repayment be expressly authorized by the articles of association *ultrà vires* and a breach of trust; and if the company be ordered to be wound up the Court will, upon an application either by the liquidator or by a creditor, under sect. 165 of the *Companies Act*, 1862, order the directors jointly and severally to make good the amount of capital so repaid, but, in case the repayment has been made with the sanction of the shareholders, without prejudice to the right of the directors to recover the amount from the shareholders.—The articles of association of a limited insurance company provided (122) that "the directors might, without the sanction of a general meeting, pay interest at the rate of 5 per cent. per annum upon the paid-up capital."—The company, desiring to raise further capital, passed a resolution empowering the directors, under the *Companies Act*, 1867, s. 27, to issue to members who had paid up the full amount of their shares, share warrants payable to bearer. Share warrants were issued accordingly, each warrant declaring that the bearer was entitled to interest at 5 per cent. per annum on the amount therein specified. —The company never having made any profits, the interest on the warrants was from time to time paid to the holders of them out of capital by the directors with the express sanction of the general body of shareholders, and on the assumption that such payment was authorized by Article 122.—The company having been ordered to be wound up, the liquidator applied by summons under sect. 165 of the *Companies Act*, 1862, that the directors might be ordered jontly and severally to pay to him the amount so paid for interest to the holders of the share warrants:—*Held* (1.), that upon the literal construction of sect. 165 the liquidator was entitled to make the application, independently of the question whether he, as representing the company, could sue its own agents, or whether he had an independent right to represent the creditors:—(2.) That the directors had, in making payments to shareholders out of capital, acted *ultrà vires* and committed a breach of trust, and that they were therefore liable jointly and severally to make good the amount of such payments, but without prejudice to their right to recover from each shareholder the amount of capital he had received. *In re* National Funds Assurance Company - 118

8. —— *Winding-up — Mortgagor and Mortgagee—Attornment Clause—Judicature Act*, 1873, *s.* 10—*Bills of Sale Act* (17 & 18 *Vict.* c. 36).] A limited company gave, in 1875, a mortgage to its bankers for its account current, by covenant to

**COMPANY**—*continued.*

surrender its copyhold works, and by the mortgage deed the company became tenant to the bankers at the rent of £5000. No surrender of the copyholds was made. On the 16th of July, 1877, the bankers sent an auctioneer to distrain for £10,000, being two years' rent. The auctioneer, on the same day, saw the managing director of the company, gave him formal notice of distraint, and by arrangement with him employed two workmen of the company to keep possession of the chattels distrained. On the 18th of July the company requested the bankers not to proceed to an immediate sale, to which the bankers assented, and the two men remained in possession. On the 19th of July a petition was presented for winding up the company; and on the 28th of July a winding-up order was made. By arrangement with the liquidator, the men went out of possession in October, and in November the bulk of the chattels was sold by the liquidator without prejudice to the rights of the bankers, and realized less than £5000:—*Held*, by *Bacon*, V.C., that under the *Judicature Act*, 1873, s. 10, the rights of the parties were the same as in bankruptcy; that the attornment clause was intended to give the mortgagees a remedy in the event of bankruptcy, and was a fraud on the bankrupt laws; that, moreover, a seizure by a secured creditor by a distress not perfected by sale before the bankruptcy was void as against the general body of creditors; and that the proceeds of sale belonged to the liquidator:—*Held*, further, that the case came within the doctrine of reputed ownership. —*Held*, on appeal, that the attornment clause created the relation of landlord and tenant; that there being no ground for saying that the rent of £5000 was so unreasonable as to be fraudulent, the mortgagees had the same rights of distress as any other landlord; and that, as the value of the chattels sold was less than one year's rent, on the mortgagees abandoning all claim to the chattels remaining unsold, the proceeds of sale must go to them.—*Ex parte Williams* (7 Ch. D. 138) distinguished.—*Held*, also, that the doctrine of reputed ownership had no application, as a distress does not make the landlord the owner of the goods distrained.—*Semble*, that where a mortgage contains an attornment clause the mortgagee is liable to wilful default in respect of the rent as being in possession. *In re* STOCKTON IRON FURNACE COMPANY - - - - C. A. 335

9. —— *Winding-up Petition—Creditor—Costs of Appearance—Practice.*] A creditor appearing on a winding-up petition is not entitled to his costs as a matter of right: to entitle him to them he must shew a reasonable ground for appearing; and if he appears merely to ask for them, and nothing more, they will be refused. *In re* HULL AND COUNTY BANK - - - - 130

10. —— *Winding-up—Petition to wind up by Debenture Holders—Powers under the Act.*] An unregistered company, incorporated by Act of Parliament, borrowed money under the powers of their Act upon debentures, and the debenture holders, not being able to get payment of their principal or interest, obtained the appointment of a receiver, but the profits of the concern not being sufficient to keep down the

**COMPANY**—*continued.*

interest upon the debentures, the debenture holders presented a petition for winding up the company, and for sale of the concern:—*Held*, that the only rights the debenture holders had under the Act of Parliament were the appointment of a receiver and priority over other debtors; and not being in the position of ordinary mortgagees, they could have no winding up or sale of the undertaking.—Petition dismissed. *In re* HERNE BAY WATERWORKS COMPANY - 42

11. —— *Winding-up — Petition by Secured Creditor—Rules in Bankruptcy—Bankruptcy Act*, 1869, *s.* 6—*Judicature Act*, 1875, *s.* 10—*Mortgage on Property abroad—Proceedings in Foreign Tribunal—Injunction.*] The rules in bankruptcy contained in sect. 6 of the *Bankruptcy Act*, 1869, are not by sect. 10 of the *Judicature Act*, 1875, made applicable to the winding-up of companies.—There is no rule in bankruptcy that a petitioning creditor who omits in his petition either to give an estimate of the value of his security or to state that he will be ready to give up his security for the benefit of the creditors in the event of his debtor being adjudicated bankrupt, thereby forfeits the benefit of his security.—An incumbrancer on immovable property situate in a foreign country, who has instituted legal proceedings in that country for the purpose of enforcing his rights, will not be restrained by injunction from prosecuting such proceedings, even though the mortgagor is a company in course of winding up, at all events if the party seeking to restrain him may appear before the foreign tribunal and assert his rights. MOOR *v.* ANGLO-ITALIAN BANK - - - - 681

12. —— *Winding-up—Priority of Petition—Advertisement in London Gazette—Person entitled to Carriage of Order.*] When a winding-up order is made upon two petitions, the advertisements of which appear in the same number of the *London Gazette*, the petitioner whose petition has been first presented is entitled to the carriage of the order. *In re* STORFORTH LANE COLLIERY COMPANY - - - - - 487

13. —— *Winding-up — Scheme of Arrangement—Wishes of Creditors—Companies Arrangement Act*, 1870, *s.* 2.] Where a scheme for the reconstruction of a company has received the sanction of three-fourths in value of the debenture holders present at a meeting held to consider the scheme, the Court sanctioned the scheme notwithstanding the opposition of the dissentient debenture holders. *In re* TUNIS RAILWAYS COMPANY [270, n.

—— Action against—Winding-up—Transfer of shares - - - - 489
*See* PRACTICE. 20.

**COMPOUNDING FELONY**—Proof in bankruptcy for amount stolen - - - 667
*See* BANKRUPTCY. 16.

**CONCEALMENT OF PROPERTY**—Bankruptcy
*See* BANKRUPTCY. 3. [179

**CONTRACT**—Rescission—Contract to take shares
*See* COMPANY. 2. [502

—— Rescission—Sale of land - - 736
*See* VENDOR AND PURCHASER. 1.

**CONVERSION** - - - - 172
*See* ADMINISTRATION 6.

**COPYRIGHT**—*Form of Registration—Copyright in "Title"—Right of Republication—Book out of Print—Acquiescence.*] In registering the copyright of a book at *Stationers' Hall* it is sufficient to enter the first publisher, under the trade name of the firm, and the actual proprietor of the copyright at the time of registration, without stating who the first proprietor was, or how the copyright devolved upon the present proprietor.—Copyright in the "title" of a book, as being a material portion of a work, will be protected, although another book published under a similar title may be totally different in form and contents.—The proprietor of a copyright does not lose his right of republication, although the book may have been out of print and obsolete, and of little or no value, for any number of years.—To sustain an allegation of acquiescence in the infringement of a copyright, it must be shewn that there was knowledge of the infringement. WELDON *v.* DICKS - - 247

**COSTS** - - - - 1, 307, 481, 676
*See* PRACTICE. 6, 7, 13, 14.

—— Administration action - - 40, 468
*See* ADMINISTRATION. 2, 3.

—— Appeal—Bankruptcy - - 313, 586
*See* BANKRUPTCY. 1, 6.

—— Bill of—Taxation - - - 388
*See* SOLICITOR. 3.

—— Lunacy—Inquisition - - - 552
*See* LUNATIC. 1.

—— Mortgage—Priority—Notice - - 696
*See* MORTGAGE.

—— Opposing bill in Parliament—Borough fund
*See* MUNICIPAL CORPORATION. [204

—— Security for - - - 1, 372, 416
*See* PRACTICE. 7, 8, 9.

—— Winding-up petition - - - 130
*See* COMPANY. 9.

**COUNTER-CLAIM** - - - - 359
*See* PRACTICE. 15.

**COVENANT**—*Lease—Lessor and Lessee—Restrictive Covenant—"Business"—Hospital—Injunction.*] A hospital, the patients of which make small payments according to their means, is a "business."—Covenant by lessee with lessor not to carry on upon the demised premises "any trade, business, or dealing whatsoever, or anything of the nature thereof, or suffer any act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience, of the neighbouring premises":—*Held* to prohibit the user of the premises as a throat and chest hospital for poor persons, where small payments were made by the patients according to their means. BRAMWELL *v.* LACY - - - - - 691

2. —— *Lease—Proviso for Re-entry—Breach of Negative Covenant—Executory Agreement—Pleading—Claim for inconsistent Relief—Waiver of one Alternative—Custom—Evidence—Costs—Restrictive Covenant—Construction—"Outward mark or show of Business."*] An agreement by *E.* to grant a lease to *D.* provided that "in case of non-performance" of any of the agreements on the part of the tenant, it should be lawful for the landlord to re-enter.—*Semble*, that the proviso

**COVENANT**—*continued.*
did not apply to the breach of a negative agreement.—The agreement also provided that the lease to be granted should contain certain specified covenants, and all such other covenants and conditions as were contained in the lease under which *E.* held the property, with such additions as might be necessary and proper in an underlease. The lease to *E.* contained a proviso for re-entry by his lessor in case the lessee should not "observe, perform, and keep" the covenants:—*Held*, that the underlease to be granted in pursuance of *E.'s* agreement with *D.* ought to contain a similar proviso, that the agreement being executory must be read as if it had contained such a proviso, and that such a proviso would extend to the breach of a negative covenant.—The lease to *E.* contained a covenant by the lessee not "to affix or permit any outward mark or show of business to be affixed" on the demised premises. *D.* granted a lease to *B.* of two of the rooms comprised in the agreement, and the right to use the entrance in common with the other occupiers of the house. *B.* carried on the business of a tailor under the firm of *H. B. & Co.* She put up in the window of one of the rooms a wire blind which had inscribed on the side of it towards the street, "*H. B. & Co.*, late *S., B., & Co.*," and also a white roller blind with the inscription on it, "*H. B. & Co.*" She also placed on the iron railings outside the entrance a brass plate with the inscription, "*H. B. & Co.*, late *S., B., & Co.*, tailors":—*Held*, that both the blinds and the brass plate constituted an "outward mark or show of business" within the meaning of the covenant, and that *D.* was entitled to re-enter under the proviso in the agreement.—*E.* commenced an action against *D.* and *B.* in respect of the breach. No lease had at this time been executed in pursuance of the agreement. The writ was indorsed with a claim for an injunction to restrain the Defendants from committing a breach of the agreement; damages for the breach; and to recover possession of the premises comprised in the agreement. By his statement of claim the Plaintiff said that the lease had not been granted to *D.*, "but the Plaintiff has always been and is ready and willing to grant the same":—*Held*, that the claim to an injunction, being founded on the continuance of the agreement, was inconsistent with the claim to recover possession, and that the Plaintiff must be taken to have waived the latter claim by stating that he was ready and willing to grant the lease:—But, *held*, that an injunction must be granted to restrain *B.* from breaking the covenant, and that the injunction must extend to *D.*, because he had not parted with the possession of the entrance, and had sanctioned the putting up of the blinds.—*Clements* v. *Welles* (Law Rep. 1 Eq. 200) distinguished.—But judgment was given for the Plaintiff without costs, on the ground that by his pleadings he had placed the Defendants in great difficulty.—It was alleged that by the custom of the estate of which the house formed part the words used in the restrictive covenant had acquired a particular meaning, and it was proposed to prove the custom by producing the counterpart of a lease granted by the owners of the estate to a person not a party to the action:—*Held*, that this was not admissible evidence. EVANS *v.* DAVIS 747

**COVENANT**—*continued.*
—— For title—Estoppel - - - 15
*See* Estoppel.
**CREDITOR**—Majority of creditors 269, 270, n.
*See* Company. 3, 13.
—— Secured—Petition for winding up - 681
*See* Company. 11.
—— Secured—Waiver of security - - 554
*See* Bankruptcy. 17.
**CROWN**—Prerogative of—Extent—Bankruptcy
*See* Bankruptcy. 15. [595
**CUSTOM OF TRADE**—Sale and return - 591
*See* Bankruptcy. 14.

**DAMAGES**—Measure of—Sale of goods—Bankruptcy of purchaser - - 586
*See* Bankruptcy. 6.
**DAMAGE TO PROPERTY**—Taking name of Plaintiff's house - - - - 294
*See* Name of House.
**DAMNUM ABSQUE INJURIÂ**—Taking name of Plaintiff's house - - - 294
*See* Name of House.
**DEBENTURE**—Bond or obligation—Charge on property of company - - 530
*See* Company. 1.
—— Holders of—Petition to wind up - 42
*See* Company. 10.
**DEBT**—Assignment of - - - 615
*See* Assignment of Debt.
**DEBTOR'S SUMMONS** - - - 573
*See* Bankruptcy. 4.
**DEED**—Estoppel - - - - 15
*See* Estoppel.
**DEFENCE**—Evasive denial - - - 393
*See* Practice. 4.
**DEMURRER**—Statute of Limitations - 31
*See* Limitations, Statute of.
**DEPOSIT**—Agreement to assign lease—Rescission of contract - - - - 736
*See* Vendor and Purchaser. 1.
—— Lands Clauses Act - - - 131
*See* Lands Clauses Act.
**DIRECTOR**—Liability of - 118, 450, 502, 576
*See* Company. 2, 5, 6, 7.
**DISCLAIMER**—Trustee in bankruptcy - 100
*See* Bankruptcy. 7.
**DISCRETION**—Judge—Trial by Judge without jury - - - - - 558
*See* Practice. 21.
—— Trustee - - - - - 273
*See* Trustee.
**DOCUMENTS**—Production of - - 235
*See* Practice. 2.

**EASEMENT**—Right to use water for engines 707
*See* Water.
**EDUCATION**—Rights of father - - 49
*See* Infant. 3.
**ELECTION**—Remedy in winding up and not by action - - - - 502
*See* Company. 2.
**EQUITABLE ASSIGNMENT** - - 615
*See* Assignment of Debt.
**EQUITY TO SETTLEMENT**—Married woman 765
*See* Husband and Wife. 2.
**ESTOPPEL**—*Deed—Mortgage—Grant—Covenants for Title—Averment of Legal Estate.*] The covenants for title in a mortgage of a freehold estate, whether read in connection with the word "grant" or not, do not amount to that precise averment that the mortgagor is seised of the legal estate which is necessary to create an estoppel as against him and persons claiming under him.—*A.*, by deed, purported to grant a freehold estate to *B.* by way of mortgage. The deed contained no recitals, but there were the usual mortgagor's covenants for title, including a covenant that the mortgagor "had power to grant the premises in manner aforesaid."—The mortgage was accepted by *B.* on the faith of certain forged title deeds produced and handed to him by *A.* At the date of the mortgage *A.* had not the legal estate nor any interest whatever in the property. Subsequently, however, *A.* acquired the legal estate and mortgaged it to *C.*:—*Held*, that, inasmuch as the mortgage to *B.* contained no precise averment that *A.* was seised of the legal estate, no estoppel had been created in favour of *B.* as against *C.* General Finance, Mortgage, and Discount Company *v.* Liberator Permanent Benefit Building Society - - - - 15
**EVASIVE DENIAL** - - - - 393
*See* Practice. 4.
**EVIDENCE**—Admission to third parties - 626
*See* Partnership. 2.
—— Fresh, on appeal - - - 579
*See* Company. 5.
—— Shorthand notes—Costs - - 307
*See* Practice. 6.
—— To explain will - - - 236
*See* Will. 6.
**EXCLUSIVE APPOINTMENT** - - 484
*See* Power.
**EXECUTION**—Debt above £50 - - 169
*See* Bankruptcy. 5.
**EXECUTOR**—"Executorship expenses" - 468
*See* Administration. 3.
—— Judgment against—Wilful default - 715
*See* Administration. 1.
—— Right to retainer - - - 727
*See* Administration. 4.
**EXECUTORY AGREEMENT**—Lease to contain certain covenants - - - 747
*See* Covenant. 2.
**EXPULSION OF PARTNER** - - 626
*See* Partnership. 2.

**FATHER**—Rights of—Education of child 49
*See* Infant. 3.
**FELONY**—Debt arising out of—Proof in bankruptcy - - - - 667
*See* Bankruptcy. 16.
**FIXTURES**—Tenant's—Trustee in bankruptcy—Disclaimer - - - - 100
*See* Bankruptcy. 7.
—— Will—Construction - - - 13
*See* Will. 5.

**FORECLOSURE**—Jurisdiction of bankruptcy 610
*See* BANKRUPTCY. 8.
**FOREIGN COURT**—Injunction against - 681
*See* COMPANY. 11.
**FOREIGNER**—Service out of jurisdiction - 550
*See* PRACTICE. 19.
**FORFEITURE**—Clause of, in will—Bankruptcy in testator's lifetime - - 157
*See* WILL. 2.
**FRAUD**—Agent—Liability of co-agent - 502
*See* COMPANY. 2.
—— Judgment obtained by - - - 327
*See* PRACTICE. 1.
**FRAUDS, STATUTE OF,** s. 4—Agreement to assign future rent - - - 615
*See* ASSIGNMENT OF DEBT.
**FRAUDULENT DEBTOR**—Prosecution of - 774
*See* BANKRUPTCY. 18.
**FRAUDULENT PROSPECTUS** - - 502
*See* COMPANY. 2.

**GIFT ON ATTAINING TWENTY-ONE** - 25
*See* WILL. 4.
**GOODWILL**—Dissolution of partnership - 626
*See* PARTNERSHIP. 2.
—— Sale of - - - - - - 436
*See* PARTNERSHIP. 3.
**GUARANTEE** - - - - - 139
*See* PRINCIPAL AND SURETY.

**HEIRS**—Devise of leasehold to - - 146
*See* WILL. 8.
—— Gift of personal estate to - - 113
*See* WILL. 3.
**HIGHWAY**—Extinction by statute - 518
*See* WAY.
**HOSPITAL**—Covenant not to carry on business 691
*See* COVENANT. 1.
**HOUSEHOLD FURNITURE**—Will—Construction
*See* WILL. 5. [13
**HUSBAND AND WIFE**—*East India Company's Trust Fund—Widow's Pension—Separate Use—Second Husband.*] Under a trust deed for providing pensions for the widows and children of clerks in the *East India Company's* service the petitioner became entitled to a widow's pension. She married a second husband, who claimed to be entitled to the pension in his marital right. The trust deed provided that the pension should be paid for the maintenance of widows and children, and that any recipient of a pension who should dispose of or incumber it should lose all right to such pension. It was obligatory on the clerks in the Company's service to contribute to this fund:—*Held*, that the pension provided for the petitioner was intended by the trust deed to be for her separate use, and the money was ordered to be paid to her upon her sole receipt. *In re* PEACOCK'S TRUSTS [490
2. —— *Wife's Equity to Settlement—Form of Settlement—Power of Appointment among Children.*] In a settlement of a wife's property made in pursuance of her equity an exclusive power of appointment by deed or will among her children ought to be given to her in priority to
**HUSBAND AND WIFE**—*continued.*
the limitations in favour of the children; and the like power was inserted in a case where the husband had, by post-nuptial deed, covenanted to settle the property on trust not including such a power. OLIVER *v.* OLIVER - - - 765
—— Partition Act—Request for sale by wife 289
*See* PARTITION. 2.
—— Separate trading - - - 573
*See* BANKRUPTCY. 4.

**ILLEGITIMATE CHILDREN** - - 236
*See* WILL. 6.
**ILLUSORY APPOINTMENT** - - 484
*See* POWER.
**INCONSISTENT RELIEF**—Pleading - 747
*See* COVENANT. 2.
**INFANT**—*Advancement—Parent and Child—Loco Parentis—Widowed Mother—Presumption.*] There is no such obligation, according to the rules of equity, on a mother to advance or make a provision for her child, as in the case of a father; and therefore, when a mother makes a purchase or investment in the name of her child, or in the joint names of herself and her child, that does not of itself afford the presumption of advancement: in such a case the intention to advance is a question of evidence.—A sum of money borrowed by a widowed mother for her son's benefit, *held*, upon the evidence, to be, not a gift, but a loan from the mother to the son provable by her against his estate on his death.—The doctrine of presumption of advancement explained.—*Sayre* v. *Hughes* (Law Rep. 5 Eq. 376) considered. BENNET *v.* BENNET [474
2. —— *Maintenance—Allowance for Past Maintenance.*] A person who was tenant for life under a will of a property producing a net income of about £140, died insolvent in 1853, leaving a daughter not a year old, who thereupon became entitled to the property, and a widow. The father was the son of a retired tradesman in a small way of business. In November, 1853, the widow being wholly without means or support, an order was made directing the whole income to be applied for the maintenance of the infant, and directing the two persons who were trustees of the will to pay it to the widow for that purpose. One of the trustees died in 1861. In 1863 the widow married a gentleman of good position but small means. No fresh application to the Court was made, but the surviving trustee went on paying the whole income to the mother till 1873, when the daughter came of age. The daughter then filed her bill, alleging that after her mother's second marriage the payment of the whole income to her was improper, and asking to have an account of the past income, and to have the balance of it paid to herself after deducting a proper allowance for her maintenance and education. It was shewn that the Plaintiff had been well educated, and had lived as a lady, that her social position had been much improved by her mother's marriage, and that the income so far as not expended on herself personally, had been applied towards the expenses of the stepfather's establishment, of which she had the benefit:—*Held*, by the Master of the Rolls, that the order for main-

**INFANT**—*continued.*
tenance ceased to be operative on the death of one of the trustees, but that the allowance of the whole income for maintenance would, under the circumstances, have been sanctioned by the Court if applied to on the death of the trustee, and again on the mother's marriage, and that the whole income ought, therefore, now to be treated as having been properly applied.—On appeal, the decision that the income ought to be treated as properly applied was affirmed, but the Court was of opinion that the order for maintenance had come to an end only on the marriage of the mother, and not on the death of the trustee. BROWN *v.* SMITH [C. A. 377

3. —— *Religious Education—Rights of Father—Examination of Infants by the Court.*] A Protestant on his marriage with a Roman Catholic lady promised that the children of the marriage should all be brought up as Roman Catholics. Soon after the birth of the first child he determined that they should be brought up as Protestants, to which determination he adhered. At the time of the proceedings there were three children, girls, aged respectively nine, eleven, and twelve. The mother, unknown to the father, and in spite of his express directions, had so indoctrinated them with Roman Catholic views that ultimately they refused to go with their father to a Protestant place of worship. The father thereupon commenced an action in their names by himself as next friend, he being a co-Plaintiff, to have them made wards of Court, and took out a summons in the action for directions as to their education. The wife then presented a petition in the matter of the infants, and of the Act 36 & 37 Vict. c. 12, with a view to their being brought up as Roman Catholics. Vice-Chancellor *Malins* dismissed the petition, and made an order on the summons declaring that the children ought to be brought up as members of the Church of *England*, and ought not to be taken to Roman Catholic places of worship, and restraining the mother from taking them to confession or to Roman Catholic places of worship without the consent of the father:—*Held*, on appeal, that the father had not forfeited his right to have the children brought up according to his own religious views, and that the Court would aid him in enforcing that right, and that the injunction had been rightly granted:—But *held*, that the declaration ought to be omitted, leaving it to the father to do what he considered to be best for the temporal and spiritual welfare of the children.—The Court refused to examine the children, considering that a stronger case was required to induce the Court to interfere with a father than with a testamentary guardian.—*Stourton* v. *Stourton* (8 D. M. & G. 760) considered. *In re* AGAR-ELLIS. AGAR-ELLIS *v.* LASCELLES [C. A. 49

4. —— *Of Unsound Mind—Jurisdiction.*] The Vice-Chancellor of the County Palatine of *Lancaster* having declined to give directions as to whether an infant ward of Court who was alleged to have become of unsound mind should or should not be kept at a lunatic asylum, on the ground that the Court had no jurisdiction to inquire whether he was of unsound mind or not:—*Held*, on appeal, that the jurisdiction of the Court over

**INFANT**—*continued.*
its infant ward was not taken away by any physical or mental disability to which the infant might be subject, and that such directions ought to be given as to his treatment as the Court considered to be most for his benefit. *In re* EDWARDS [C. A. 605

**INJUNCTION**—Breach of covenant - 691, 747
*See* COVENANT. 1, 2.

—— Taking name of Plaintiff's house - 294
*See* NAME OF HOUSE.

—— Winding-up — Proceedings before foreign Court - - - - 681
*See* COMPANY. 11.

**INQUISITION IN LUNACY**—Costs of - 552
*See* LUNATIC. 1.

**INTERLOCUTORY ORDER**—Order in winding-up—Appeal - - - - 335
*See* PRACTICE. 5.

—— Time for appealing - - - 420
*See* PRACTICE. 10.

**INTERPLEADER**—Jurisdiction of *London* Court of Bankruptcy - - - 575
*See* BANKRUPTCY. 9.

**INVENTORY**—Bill of sale - - 76, 313
*See* BILLS OF SALE ACT. 1, 2.

**JUDGMENT** — Administration action — Fresh action for wilful default - - 715
*See* ADMINISTRATION. 1.

—— Obtained by fraud—Action to impeach 327
*See* PRACTICE. 1.

**JURISDICTION**—Bankruptcy - 94, 575, 610
*See* BANKRUPTCY. 8, 9, 10.

—— Infant of unsound mind - - 605
*See* INFANT. 4.

—— Service out of - - - - 550
*See* PRACTICE. 19.

**JURY**—Trial by - - - - 558
*See* PRACTICE. 21.

**LANCASTER COURT** — Jurisdiction — Infant of unsound mind - - - 605
*See* INFANT. 4.

**LANDLORD AND TENANT**—Covenants in lease
*See* COVENANT. 1, 2. [691, 747

—— Fixtures—Disclaimer of lease by trustee in bankruptcy - - - - 100
*See* BANKRUPTCY. 7.

**LANDS CLAUSES ACT, 1845**, *ss.* 85, 87—*Practice — Railway Company — Landowner — Bond — Breach of Condition—Deposit—Right to petition for Payment out.*] Where a railway company, prior to entering upon lands, has made a deposit in the bank and given a bond under sect. 85 of the *Lands Clauses Consolidation Act*, 1845, the Court has jurisdiction, under sect. 87, in the event of the non-performance of the condition of the bond, to order payment out of the deposit to the landowner on a petition presented by him for that purpose adversely to the company. *In re* MUTLOW'S ESTATE - - - - - 131

**LAPSED SHARE** — Administration of estate — Costs - - - - 40
*See* Administration. 2.

**LEASE**—Agreement to assign—Lessor's option to determine - - - - 736
*See* Vendor and Purchaser. 1.

—— Covenants - - - 691, 747
*See* Covenant. 1, 2.

—— Underlease—Administrator—Merger 743
*See* Merger.

**LEASEHOLDS**—Devise to right heirs - 146
*See* Will. 8.

—— Disclaimer by trustee in bankruptcy 100
*See* Bankruptcy. 7.

**LEGACY DUTY**—Colonial—English domicil 279
*See* Administration. 5.

**LIEN**—Solicitor—Costs - - 291, 729
*See* Solicitor. 1, 2.

—— Solicitor—Set-off of debt against costs 676
*See* Practice. 13.

**LIMITATIONS, STATUTE OF** — *Demurrer — Partnership Transactions.*] In 1858 the Plaintiff and Defendant entered into partnership transactions which came to a final termination in 1861, when the Defendant admitted that £787 was due to the Plaintiff, but he never subsequently made any admission of the debt, or promise to pay. The Plaintiff brought an action for an account of the partnership dealings:—*Held*, that the *Statute of Limitations* could be set up on demurrer; and was a good defence to a claim for the partnership accounts.—*Miller* v. *Miller* (Law Rep. 8 Eq. 499) dissented from. Noyes *v.* Crawley - 31

**LIQUIDATION** - - - 183, 595
*See* Bankruptcy. 11, 15.

—— Lunatic creditor—Proxy - - 554
*See* Lunatic. 2.

**LIQUIDATOR**—Official—Appointment of - 269
*See* Company. 3.

—— Powers of - - - - 118
*See* Company. 7.

**LOCKE KING'S ACT** (17 & 18 Vict. c. 113) 460
*See* Administration. 7.

**LUNATIC**—*Costs of Inquisition — Deceased Lunatic—Lunacy Regulation Act* (25 & 26 *Vict. c.* 86), *s.* 11.] A person was found to be a lunatic by inquisition, but died before a committee of her estate had been appointed. On an application under the *Lunacy Regulation Act* the Court made a declaration that the costs of the inquisition had been properly incurred, and ought to be paid out of the deceased lunatic's estate in a due course of administration. *In re* Meares - C. A. 552

2. —— *Creditor of Liquidating Debtor—Proxy —Committee.*] The committee of the estate of a lunatic who is a creditor of a liquidating debtor has no power, without the sanction of the Court of Lunacy, to appoint a proxy to vote on behalf of the lunatic in the liquidation proceedings, or to waive any of his rights against the debtor's estate. *Ex parte* Wood. *In re* Wright - C. A. 554

—— Petition for liquidation - - - 183
*See* Bankruptcy. 11.

—— Trustee Acts - - - - 29, 93
*See* Trustee Acts. 1, 2.

**MAINTENANCE**—Infant - - 377, 474
*See* Infant. 1, 2.

**MERGER** — *In Equity — Term—Administrator—Assignment — Action.*] *C.*, an administrator, granted an underlease for a term of years of land held by him as administrator. Shortly afterwards the underlessee assigned the land to *C.* for the residue of the term:—*Held*, that there was in equity no merger of the term, and that Plaintiffs who would be entitled to the land if the term was in existence could maintain an action to establish their title to the land for the term, and for mesne profits. Chambers *v.* Kingham - - 743

**METROPOLITAN PAVING ACT**—Purchase-money —Payment out of Court—Costs - 481
*See* Practice. 14.

**MINE**—Settled Estates Act—Rents received from minerals - - - - 499
*See* Settled Estates Act. 1.

**MISDESCRIPTION**—Bill of sale—Residence of vendor - - - - 398
*See* Bills of Sale Act. 3.

**MORTGAGE**—*Priority—Notice to Trustee's Solicitors—Costs.*] A formal notice in writing of a charge upon a reversionary interest sent by the incumbrancers to the solicitors acting for the trustees, and by them verbally communicated to the trustees, is sufficient to fix the trustees with notice of the charge; and the incumbrancers do not lose their priority over subsequent incumbrancers from the fact that the trustees, when subsequently applied to by such subsequent incumbrancers proposing to make an advance upon the same security, answer that they are not aware of and have not received notice of any advance having been already made. Costs of first incumbrancers added to their debt; costs of solicitors paid by the trustees.—*Semble*, the notice to the solicitors would have been sufficient even if not communicated. Saffron Walden Building Society *v.* Rayner - - 696

—— Administration—Locke King's Act - 460
*See* Administration. 7.

—— Attornment clause—Reputed ownership 335
*See* Company. 8.

—— Covenant for title—Estoppel - - 15
*See* Estoppel.

—— Furniture—Agreement to let goods - 76
*See* Bills of Sale Act. 1.

—— Sale of mortgaged property—Bankruptcy jurisdiction - - - - 610
*See* Bankruptcy. 8.

—— Solicitor and client—Lien - 291, 729
*See* Solicitor. 1, 2.

—— Undischarged bankrupt—Possible surplus
*See* Bankruptcy. 19. [434

**MOTION**—For decree—On admissions - 162
*See* Practice. 16.

—— To dismiss for want of prosecution - 1
*See* Practice. 7.

**MUNICIPAL CORPORATION**—*Opposing Bill in Parliament, Expenses of—Charging Borough Fund —Interference with Corporate Rights—Municipal Corporations Act*, 1835 (5 & 6 *Will.* 4, *c.* 76), *s.* 92—*Municipal Corporations* (*Borough Funds*) *Act*, 1872 (35 & 36 *Vict. c.* 91), *s.* 8.] Municipal corporations having been reduced by the *Municipal*

**MUNICIPAL CORPORATION**—*continued.*
*Corporations Act*, 1835, from the position of owners of property to that of trustees, possess the ordinary right of trustees to defend their trust property and their rights as trustees from attack at the expense of the trust estate.—Consequently, a municipal corporation has the right, either under sect. 92 of the *Municipal Corporations Act*, 1835, or under the general law applicable to trustees, to defray, out of the borough funds or rates, the expenses of any attack made by bill in Parliament, whether against their existence as a corporation, or against their property, or only against their rights, powers, or privileges; and that right is not taken away by the *Municipal Corporations (Borough Funds) Act*, 1872.—*Bright* v. *North* (2 Ph. 216), *Attorney-General* v. *Corporation of Wigan* (Kay, 268; 5 D. M. & G. 52), and *Reg.* v. *Mayor of Sheffield* (Law Rep. 6 Q. B. 652), considered. ATTORNEY-GENERAL *v.* MAYOR OF BRECON - - 204

**NAME OF HOUSE**—*Injunction—Damage to Property—Demurrer—Damnum absque injuriâ.*] The Plaintiffs alleged in their statement of claim that their house had been called "*Ashford Lodge*" for sixty years, and the adjoining house belonging to the Defendant had been called "*Ashford Villa*" for forty years, and that the Defendant had recently altered the name of his house to that of the Plaintiffs' house. The Plaintiffs alleged that this act of the Defendant had caused them great inconvenience and annoyance, and had materially diminished the value of their property, and they claimed an injunction to restrain the Defendant from continuing to use the name of their house:—*Held* (overruling the decision of *Malins*, V.C.), that the alleged act of the Defendant in calling his house by the name of the Plaintiffs' house was not a violation of any legal right of the Plaintiffs: and there being no allegation of malicious intention, a demurrer to the statement of claim was allowed.—*Semble*, no change has been made by the *Judicature Act*, 1873, s. 25, sub-s. 8, in the principle on which the Court grants injunctions. DAY *v.* BROWNRIGG - - - C. A. 294

**NEGATIVE COVENANT**—Proviso for re-entry—Lease - - - - 747
*See* COVENANT. 2.

**NEGLIGENCE**—Partner - - - 185
*See* PARTNERSHIP. 1.

**NEW TRIAL**—Motion for - - - 416
*See* PRACTICE. 9.

**NEXT FRIEND**—Person of unsound mind 235
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**OBLIGATION**—Railway debenture — Charge on property - - - - 530
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**PARLIAMENT** — Expense of opposing bill — Borough fund - - - 204
*See* MUNICIPAL CORPORATION.

**PARTIES**—Adding parties - - - 768
*See* PRACTICE. 3.

**PARTITION**—*Partition Acts*, 1868 *and* 1876—*Trustees representing Beneficiaries — Rules of Court*, 1875, *Order XVI., r.* 7.] Order XVI., rule 7, of the Rules of Court, 1875, enabling trustees to represent their beneficiaries in an action, applies to an action under the *Partition Acts*, 1868 and 1876. SIMPSON *v.* DENNY - - - 28

2. —— *Practice—Partition Act*, 1876 (39 & 40 *Vict. c.* 17), *s.* 6—*Request by Persons under Disability—Form of Judgment.*] In a partition action by a married woman and her husband her request for sale may be made by her counsel authorized to act on her behalf. CROOKES *v.* WHITWORTH - - - - - 289

**PARTNERSHIP** — *Loss arising from Negligence of Partner—Arbitration—Assent of Partners to Submission.*] *T.*, the managing partner of a colliery, received notice from *L.*, an adjoining owner, that the workings were being carried on beyond the boundary. *T.* insisted that he was entitled to the disputed ground, and carried on his workings. An action was then commenced against him by *L.*, and was referred to arbitration. *T.'s* partners were not informed of these proceedings till after the reference to arbitration had been agreed to. They did not object to it, but treated it as a proceeding in which they were interested, and were present before the arbitrator. The arbitrator awarded that there had been a trespass, and assessed the damages at £6000. The partners refusing to contribute, *T.* filed his bill to compel them to do so. The Defendants set up the case that *T.* had wilfully and knowingly worked beyond the boundary. *Bacon*, V.C., considered that he had not worked beyond his boundary at all, but held him not entitled to contribution, on the ground that he had no authority to refer the dispute to arbitration without the assent of his partners, and that their subsequent assent was given in ignorance of material facts, and was not a sufficient ratification.—On appeal, the Court was of opinion that the arbitration had been assented to, so as to make the arbitrator's award binding on the co-partners as to the fact of trespass and the *quantum* of damages, but, being of opinion that the Plaintiff, although he had not knowingly trespassed, had worked beyond the limits of the part-

**PARTNERSHIP**—*continued.*

nership colliery without proper inquiry as to the limits, and had acted with gross negligence and recklessness in continuing his workings after notice, and without consulting his partners, when it was evident that his right to work in the disputed area was extremely doubtful, and the profits to be expected from so doing very small:—*Held*, that the decision that the other partners were not liable to contribute ought to be affirmed:—*Held*, also, that as no additional costs had been occasioned by the allegation that the Plaintiff had wilfully and knowingly trespassed, the Plaintiff could not be relieved from any part of the costs on the ground of the failure of that allegation. Thomas *v.* Atherton - - - - C. A. 185

2. —— *Power of Expulsion — Validity of Notice—Bona fides—Partnership Accounts—Goodwill — Evidence — Admissibility — Admissions to Third Party.*] The articles of partnership of a business carried on in *England* and in *India* provided that the partnership should continue until dissolved as therein mentioned. Clause 20 provided that as soon as possible after the 30th of April in each year a general account and rest should be taken by the partners of the "stock, moneys, debts, lands, buildings, factories, and other the estate and effects belonging, due, and owing to the partnership," and of the debts and liabilities of the partnership, and that a fair valuation should be made of all the particulars included in such accounts which might be susceptible of valuation, and that copies of such account, rest, and valuation should be sent to the partners who were resident abroad; and that, for determining the profit and loss of the concern, full statements of the partnership and of the accounts of each partner should be made out up to the 30th of April in each year, and copies sent to each partner. It was provided that any partner might retire at any time upon giving twelve months' notice, and that, if a majority of the partners should at any time desire that any of the partners should retire, and should give him six months' notice in writing to that effect, the partnership should, as regarded him, be dissolved at and from the time mentioned in the notice, There was also, in case of the death of any partner, a provision for the dissolution of the partnership as regarded him. It was further provided, that if any partner should die or cease to be a partner under any of the provisions of the articles, there should be placed to his credit, in lieu of his share of profits accruing since the 1st of May next preceding his death or ceasing to be a partner, a sum equal to a proportionate part of his share of one year's profit calculated upon the average profits of the three preceding years of the partnership, and that the surviving or continuing partners should pay to the representatives of the deceased partner, or to the party ceasing to be a partner, the sum which should appear at his credit after the same should have been adjusted under the provisions thereinbefore contained, in three equal annual instalments. There was a provision for the entire dissolution of the partnership at any time at the will of a majority of the partners, of whom the junior partner was to be one. And it was provided, that, if any partner

**PARTNERSHIP**—*continued.*

should retire or be removed, or if the partnership should be wholly dissolved, and a partnership should be formed by any three of the partners (one of them being the senior partner) for the time being for the purpose of carrying on the same business, the partner retiring or being removed, or who should not become a partner in the new partnership, should not enter into any business of a similar nature at any place where the partnership might have establishments, and any partner committing a breach of this provision was to pay to the other partners £10,000 as liquidated damages. On the 30th of April, 1875, the other partners gave the Plaintiff notice in writing of their desire that he should retire from the partnership, which would be, as regarded him, dissolved at and from the 31st of October then next. The reason for giving this notice was that the other partners were dissatisfied with the conduct of the Plaintiff. After the giving of the notice the Plaintiff was treated as no longer a partner, and he was not allowed to assist in the taking of the accounts, which were taken after April, 1875. In the valuation of the assets of the partnership which was then made the goodwill of the business was not included.—The Plaintiff filed his bill against the other partners, praying a declaration that the partnership was not effectually dissolved, and that the Defendants were not entitled to exclude him from the partnership; or that, if the partnership had been effectually dissolved, it might be wound up by the Court, and the value of the Plaintiff's interest in the business and assets, including the goodwill, ascertained:—*Held*, by *Fry*, J., that the Defendants were not entitled to exclude the Plaintiff without first giving him a full opportunity of explaining his conduct: but that, upon the evidence, the Defendants had given the Plaintiff this opportunity before the notice was served upon him:—*Held*, also, by *Fry*, J., that the notice, being valid at the time when it was given, could not be afterwards rendered invalid by the fact that the accounts afterwards taken were not taken in accordance with the provisions of the articles: but that the Plaintiff ought to have been allowed to assist in the taking of the accounts after April, 1875, and that the goodwill of the business ought to have been included in the valuation of the property of the partnership, and that the Plaintiff was entitled to have the accounts taken and the valuation made by the Court.—The Plaintiff was not called as a witness in support of his case:—*Held*, by *Fry*, J., that the Defendants were entitled to put in evidence letters written by the Plaintiff to a person not a party to the action, and containing admissions by the Plaintiff material to the questions in issue; but that the Plaintiff must have, if he desired it, an opportunity of explaining the letters.—On appeal from so much of the decree as declared that the goodwill ought to be included in the valuation of the property of the partnership:—*Held*, that the goodwill ought not to be so included. Steuart *v.* Gladstone - - - - C. A. 626

3. —— *Sale of Goodwill and Business—Right to use Partnership Name.*] Two ladies, *V. C.* and *M. W.*, carried on business in *London* in partnership under the firm of *C. & W.* *V. C.* married *L.*

**PARTNERSHIP**—*continued.*

After this a decree for dissolution was made, and it was ordered that "the said partnership business, and the leasehold premises, trade fixtures, stock-in-trade, goodwill, and business," should be sold as a going concern to *M. W.* or to *L.* and wife, whichever should be the highest bidder. *M. W.* became the purchaser of all the property directed to be sold. *L.* and wife, who carried on business in *Paris* under the firm of *C. et Cie*, commenced an action to restrain *M. W.* from carrying on the business under the style or firm of *C. & W.*:—*Held*, by *Hall*, V.C., that the assignment of the goodwill did not include the right to use the name of a living person, and that an injunction ought to be granted.—*Held*, on appeal, that *L.* and wife had no right to restrain *M. W.* from using the name of the old firm.—*Per James*, L.J.:—The assignment of the goodwill and business included the exclusive right to use the name of the old firm. Levy *v.* Walker - - - C. A. 436

—— Action for accounts—Statute of Limitations *See* Limitations, Statute of. [31

—— Proof in bankruptcy—Joint and separate assets - - - - 554 *See* Bankruptcy. 17.

**PAUPER**—Security for costs - 372, 416 *See* Practice. 8, 9.

**PAYMENT**—Appropriation of - - 139 *See* Principal and Agent.

—— Shares—Services rendered - - 720 *See* Company. 4.

**PAYMENT OUT OF COURT** — Costs — Special statute - - - - 481 *See* Practice. 14.

—— Trustee Relief Act - - - 228 *See* Trustee Relief Act. 2.

**PERPETUITY** - - - - - 264 *See* Will. 7.

**PERSONAL ESTATE**—Conversion - - 172 *See* Administration. 6.

—— Will—Gift to heirs - - - 113 *See* Will. 3.

**PETITION**—Settled Estates Act - - 230 *See* Settled Estates Act. 2.

—— Winding-up - - - 42, 487, 681 *See* Company. 10, 11, 12.

**PLEADING** - - - 359, 393, 768 *See* Practice. 3, 4, 15.

—— Amendment of - - - - 502 *See* Company. 2.

—— Inconsistent relief - - - 747 *See* Covenant. 2.

**POSSESSION**—Right to take—Bill of sale - 408 *See* Bankruptcy. 12.

**POSSESSION MONEY**—Execution - - 169 *See* Bankruptcy. 5.

**POWER**—*Appointment—Non-exclusive—Appointment to "Survivors" of Objects—Illusory Appointment*—11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 46.] An appointment since the *Illusory Appointments Act* (11 Geo. 4 & 1 Will. 4, c. 46), under a non-exclusive power, of an entire fund unto and amongst the objects "and the survivors and survivor of them, and if only one should survive, then unto that one":—

**POWER**—*continued.*

*Held* valid.—*Dictum* in *Minchin* v. *Minchin* (3 Ir. Ch. Rep. 167) disapproved of. *In re* Capon's Trusts - - - - - - 484

**PRACTICE**—*Action to impeach Judgment as obtained by Fraud.*] The Plaintiffs brought an action against the Defendants to restrain alleged infringements of a patent process for printing on metal plates. The Plaintiffs printed from dry lithographic stones put into relief. The Defendants alleged that they the Defendants printed by the ordinary damp lithographic process from flat stones. Pending the proceedings, an order was made by the Court of Appeal that an expert named by the Plaintiffs and not objected to by the Defendants should be at liberty to inspect the Defendants' process, and the Defendants gave an undertaking to shew him the whole process. The inspector examined the process, and was shewn twenty-seven stones used by the Defendants, and reported to the effect that the Defendants' mode of printing was the same as the ordinary process of lithography, except that tin was used instead of paper. The action being tried on these materials was ultimately dismissed by the Court of Appeal. The Plaintiffs shortly afterwards commenced an action to have it declared that the judgment on the appeal had been obtained by fraud, and for consequential relief. The alleged fraud was that the Defendants, when the inspection took place, had in use not only the above twenty-seven stones, but also stones on which the designs were placed in relief—that they removed such latter stones from the place where the inspection took place, in order to conceal from the inspector the fact that they had stones on which the design was in relief—that they falsely stated to the inspector that they had no other stones than those shewn to him—and that the Defendants stated to the inspector that the ink used by them was ordinary lithographic ink, whereas in fact they used ink specially prepared for the Plaintiffs' use by a particular manufacturer for printing by the dry process. *Bacon*, V.C., considered the case of fraud proved, and made a decree in the Plaintiffs' favour, but the Court of Appeal was of opinion that no fraud was proved, and dismissed the action.—*Per James* and *Thesiger*, L.JJ. (*dissentiente Baggallay*, L.J.): *Semble*, that an action to impeach a judgment on such grounds was not maintainable. Flower *v.* Lloyd - - - - C. A. 327

2. —— *Affidavit of Documents—Next Friend—Rules of Court*, 1875, *Order* xxxi., *r.* 12.] Where a Plaintiff of unsound mind sues by a next friend, the Defendant is entitled to an affidavit of documents made by the next friend or by some one acquainted with the facts. Higginson *v.* Hall [235

3. —— *Amendment—Adding Party—Death of a Defendant—Abatement—Revivor—Date of Order made subject to production of Affidavit of Service—Rules of Court*, 1875, *Order* xvi., *r.* 13; *Order* xxvii., *r.* 1; *Order* l.] An action was brought against three Defendants, claiming damages in respect of their alleged conspiracy and false representations. Before the action could come on for trial one of the Defendants died. Administration was taken out to his estate. The Plaintiff did not apply for an order of course to continue the

**PRACTICE**—*continued.*

proceedings against the administrator, but he obtained in Chambers an order giving him leave to amend the writ and statement of claim by adding the administrator as a Defendant, and by making allegations that the estate of the intestate had been benefited by reason of the matters complained of in the action. The administrator was served with notice of the summons on which this order was made, but did not appear on the hearing, and the order was drawn up on the production of an affidavit of service of the summons on him. The order as drawn up was dated as of a day prior to the date of the filing of the affidavit. The writ and statement of claim, having been amended in pursuance of the order, were served on the administrator. He then entered a conditional appearance and moved to discharge the order for irregularity:—*Held*, that the order had been regularly made under Order XXVII., rule 1, and Order XVI., rule 13.—But, *held*, that the administrator ought not to have been served with the summons, and that the order must be amended by striking out the affidavit of service.—*Held*, however that the order must bear date the day on which the affidavit was filed. ASHLEY *v.* TAYLOR **768**

**4.** —— *Pleading — Amendment — Leave to amend—Evasive Denial—Rules of Court*, 1875, *Order XIX., rr.* 17, 22.] In an action against a lessee to set aside a lease granted under a power, the statement of claim stated that the donee of the power had received a specified sum as a bribe, and stated the circumstances; the statement of defence denied that that particular sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given. *Fry*, J., having held that the denial was evasive, and amounted to an admission that some bribe had been given, and having refused leave to amend the statement of defence:—*Held*, by the Court of Appeal, that leave to amend the statement of defence ought to be given.—*Per Bramwell*, L.J.: As a general rule leave to amend ought not to be refused unless the Court is satisfied that the party applying is acting *malâ fide*, or that his blunder has done some injury to the other side which cannot be compensated by payment of costs or otherwise.—Whether the Defendant ought on the pleadings to be held to have admitted the acceptance of some bribe, *quære*. TILDESLEY *v.* HARPER - - - - **C. A. 393**

**5.** —— *Appeal—Order in Winding-up—Amending Notice of Appeal—Interlocutory Order—Rules of Court*, 1875, *Order LVIII., rr.* 3, 4.] An order was made in the winding-up of a company, deciding that the proceeds of a sale of property of the company belonged to the liquidator, and not to the mortgagees who claimed them. The mortgagees appealed from the order:—*Held*, that the order was not an interlocutory order; and that the proper notice of appeal was a fourteen days' notice; but a four days' notice having been given, the Court allowed it to be amended.—The Court of Appeal has full discretion, under Rules of Court, 1875, Order LVIII., rule 3, to allow a notice of appeal to be amended as to dates or otherwise, and special circumstances are not required to justify such amendment. *In re* STOCKTON IRON FURNACE COMPANY - - - - **C. A. 335**

**PRACTICE**—*continued.*

**6.** —— *Appeal — Part of Order — Rules of Court*, 1875, *Order LVIII., rr.* 2, 3—*Costs—Shorthand Notes of Evidence.*] *A.*, *B.*, and *C.* agreed with a company to take 1400 £1 shares, to be equally divided among them, in respect of which shares £310 had been paid generally. The company having been afterwards ordered to be wound up, an order was made putting *A.* on the list of contributories for 157 shares, *B.* for 466, and *C.* for 467. *A.* was put on the list for 157 shares only, because the Judge considered that under an arrangement between the parties the £310 was to be attributed to *A.*'s shares, so that 310 of them were fully paid up. *B.* appealed generally from this order, serving only the official liquidator. The Court of Appeal was of opinion that *B.* was properly put on the list, but that the £310 was attributable to all the 1400 shares:—*Held* (by *James* and *Baggallay*, L.JJ., *dissentiente Thesiger* L.J.), that a direction crediting *B.* with one-third of the £310 ought to be made, though there was now no opportunity of altering the order as against *A.*—The costs of shorthand notes of evidence in the Court below are not to be allowed as a matter of course upon an appeal, but only where a case is made for such allowance. *In re* DUCHESS OF WESTMINSTER SILVER LEAD ORE COMPANY **[C. A. 307**

**7.** —— *Appeal—Security for Costs—Motion to dismiss for want of Prosecution—Costs of Motion.*] On the 26th of June an Appellant in bankruptcy was ordered to give additional security for the costs of the appeal. On the 4th of November, the security not having been given, the Respondents' solicitor, without having previously written to the Appellant's solicitors, gave notice of motion to dismiss the appeal for want of prosecution. On the 13th of November the additional security was given, and on the 14th of November the motion to dismiss came on to be heard:—*Held*, that the Appellant must pay the costs of the motion, and that the appeal could not be heard until he had done so. *Ex parte* ISAACS. *In re* BAUM (No. 2) **[C. A. 1**

**8.** —— *Appeal—Security for Costs—Pauper—Rules of Court*, 1875, *Order LVIII., r.* 15.] A Plaintiff, who was in receipt of parochial relief, was ordered by the Court of Appeal to give security for the costs of an appeal, the Court being of opinion that the appeal was a speculative one.—*Per Cotton*, L.J.:—The insolvency of an Appellant is, *primâ facie*, a sufficient reason for ordering him to give security for costs. *In re* IVORY. HANKIN *v.* TURNER - - - - **C. A. 372**

**9.** —— *Appeal—Security for Costs—Pauper—Special Circumstances—Abandoned Motion—Motion for New Trial—Rules of Court*, 1875, *Order XL., r.* 10.] A Defendant in an action which had been tried by a Judge without a jury gave notice of appeal against the judgment, and also obtained *ex parte* a rule *nisi* for a new trial. He did not set down the appeal for hearing, but, before the argument of the new rule for a new trial, gave fresh notice of appeal from the judgment. There was a substantial question to be tried as to the measure of damages. The Appellant being in insolvent circumstances, the Plaintiff moved for security for costs:—*Held*, first, that the Plaintiff

**PRACTICE**—*continued.*

was entitled to the costs of the first notice of appeal as an abandoned motion :—Secondly, that the second notice of appeal was unnecessary, inasmuch as the whole question could be tried under Rules of Court, 1875, Order XL., rule 10, upon the application to make the rule for a new trial absolute; and the Appellant was therefore ordered to give security for costs. WADDELL *v.* BLOCKEY [C. A. 416

10. —— *Appeal—Time for appealing—Finding of Fact—Interlocutory Order—Order XXXIX., r. 1a.*] An action for an injunction to restrain the Defendant from building so as to interfere with a right of way claimed by the Plaintiff, which right was disputed, came on for trial before the Master of the Rolls, with witnesses, no issues of fact having been directed. After the examination had been concluded, the Master of the Rolls stated that he found a verdict for the Plaintiff as to the right of way, and directed the action to stand over in order to give the parties an opportunity of coming to an arrangement. Upon the action coming on again, a mandatory injunction was granted; the order reciting that the Court had found the Plaintiff entitled to the right of way. The Defendant, after the expiration of twenty-one days from the time when the verdict had been given, appealed from the order:—*Held*, that the finding that the Plaintiff was entitled to the right of way could not now be questioned, for that the Defendant ought to have moved the Court of Appeal for a new trial within twenty-one days from the verdict being given.—Order XXXIX., rule 1a of the Rules of Court, 1875, does not apply to trials before a Judge of the Chancery Division, but where a Judge of that Division has definitely found a verdict on a matter of fact, such verdict is equivalent to an interlocutory order, which can only be appealed from within twenty-one days. KREHL *v.* BURRELL - - - C. A. 420

11. —— *Appeal—Time for appealing—Interlocutory Order—Action in Chancery Division—Trial by Judge without a Jury—Finding of Fact—Rules of Court*, 1875, *Order XXXIX., r. 1a; Order LVIII., r. 15.*] When in an action in the Chancery Division, tried by a Judge of that Division without a jury, definite issues of fact are settled at the commencement of the trial, then, whether the Judge delivers his finding on the facts and his judgment on the whole case on separate days or at one time, his finding of fact is an interlocutory order, and must be appealed from within twenty-one days.—But, if no definite issues of fact are settled at the commencement of the trial, the finding of fact as well as the judgment on the whole case may be appealed from at any time within a year.—*Krehl* v. *Burrell* (10 Ch. D. 420) explained. LOWE *v.* LOWE - - C. A. 432

12. —— *Appeal—Time for setting down Appeal—Rules of Court*, 1875, *Order LVIII., r. 8.*] An interlocutory order having been made in an action on the 3rd of April, the Defendants on the 23rd of April gave notice of appeal for the 30th of April. The order was not drawn up till the latter end of June, and the Defendants then set down the appeal. Upon its coming on to be heard the Plaintiffs objected that it could not be heard, as it had not been set down in time:—*Held*, that as it was the duty of the Plaintiffs to draw up the order, and the appeal had been set down as soon as the Plaintiffs had enabled the Defendants to comply with the requisition of Rules of Court, 1875, Order LVIII., rule 8, that an office copy of the order shall be produced, the objection could not be sustained. *In re* HARKER. GOODBARNE *v.* FOTHERGILL - - - - C. A. 613

13. —— *Costs—Debt—Award—Set-off—Solicitor's Lien—Common Law Rules as to Costs—Chancery Division—Additional Rules of Court (Costs)*, 1875, *rr.* 19, 28.] By an arbitrator's award in an action the Plaintiff was ordered to pay a sum of money to the Defendant, and the Defendant was ordered to pay the Plaintiff a part of his costs when taxed:—*Held*, that the Defendant was entitled to have the debt set off against the taxed costs, and that the right of set-off in such a case was not interfered with by the ordinary solicitor's lien for costs.—Rule 28 of Additional Rules of Court (Costs), 1875, when applied to the Chancery Division, does not mean that the old Common Law rules as to costs shall prevail in the Chancery as well as the other Divisions, but that the rules of the old Court of Chancery as to costs shall, except where altered by the new rules, remain in force in the Chancery Division. PRINGLE *v.* GLOAG - - - - - 676

14. —— *Costs—Discretionary Power of Court—Judicature Act*, 1875—*Rules of Court*, 1875, *Order LV.—Repeal of prior Statutory Enactments—General Metropolitan Paving Act*, 1817 (57 *Geo.* 3, *c. xxix.*)—*Purchase of Lands—Purchase-money—Petition for Payment out—Parties entitled to Rent-charges otherwise secured—Service.*] It is now immaterial to consider whether any public or private statute passed prior to the *Judicature Act*, 1875, has made or omitted to make any express provision as to the costs of particular proceedings under any such statute, inasmuch as the combined effect of the *Judicature Act*, and Order LV. of the Rules of Court, 1875, giving the Judges of the High Court of Justice a discretion as to costs in all cases, with certain exceptions specified in the Order, is to repeal all previous enactments directing costs to follow certain rules: *Garnett* v. *Bradley* (3 App. Cas. 944); and, where a previous statute is silent as to the costs of particular proceedings under it, to supply the omission.—Where a petition was presented for payment out of Court of purchase-money paid in in respect of real estate purchased under the *General Metropolitan Paving Act* (57 Geo. 3, c. xxix.), service of the petition upon parties entitled to certain small rent-charges charged on the property purchased, but which were amply secured on other property not included in the purchase, was held to be unnecessary. *Ex parte* MERCERS' COMPANY - 481

15. —— *Counter-claim—Rules of Court*, 1875, *Order XIX., r. 3; Order XXII., r. 9.*] The executors of *M.*, a holder of debentures of a company to the amount of £2000, commenced an action to have the trusts of a deed for securing payment of the debentures of the company carried into execution. The company delivered a defence and counter-claim. By the defence they alleged that an amount exceeding £2000 was, under the circumstances mentioned in the counter-claim, due

**PRACTICE**—*continued.*

from *M.* to the company, and claimed a set-off. By the counter-claim they alleged that *M.* had been a director and promoter of the company, and while filling those characters had joined with other persons in selling an estate to the company at a profit, concealing the fact of his interest in the estate, and that he had received more than £2000 as his share of the profit of the transaction. The counter-claim asked that the executors might be ordered to pay to the company the share of profit which *M.* had received, and also the remainder of the profit which, in breach of his duty as a director, he had allowed to be received by the other vendors. The Plaintiffs applied to have the counter-claim excluded on the ground that it could not be conveniently disposed of in the present action, and ought to be tried in an independent proceeding. The application having been refused by *Hall*, V.C., the Plaintiffs appealed:—*Held*, that although, taking Order XIX., rule 3, and Order XXII., rule 9, together, the question whether a counter-claim shall be excluded is not so entirely in the discretion of the Judge of first instance as to preclude an appeal, he has a discretion which will not be interfered with by the Court of Appeal except in a very strong case, and that in the present case this discretion had been rightly exercised. HUGGONS *v.* TWEED C. A. 359

16. —— *Motion for "Decree or decretal Order"—Administration Action—Admissions in Statement of Defence—Rules of Court*, 1875, *Order* XL., *r.* 11—*Direction to pay Cash Balance into Court.*] Upon admissions in a statement of defence in an administration action, and upon a notice of motion for "a decree or decretal order," an order can, under Rules of Court, 1875, Order XL., rule 11, be made upon an ordinary motion without setting down the motion. *In re* BARKER'S ESTATE. HETHERINGTON *v.* LONGRIGG - - - 162

17. —— *Sale by Court—Conduct of Sale—Right of any Party to advertise Sale.*] When a sale has been directed by the Court, and the conduct of it given to one party, no other party has a right to interfere in any way in the sale without the leave of the Court. Thus, where the Court directed a sale and gave the conduct of it to an independent solicitor, both Plaintiff and Defendant having liberty to bid, the Plaintiff was restrained by injunction from issuing and circulating advertisements that the sale was about to take place. DEAN *v.* WILSON - - - - 136

18. —— *Sequestration—Receiver in lieu of Sequestration—Judicature Act*, 1873, *s.* 25, *sub-s.* 8.] Plaintiff in an action, which had been followed by a cross-action, obtained an order in both actions that his costs of the cross-action should be paid by the Defendant in the action, a married woman, entitled for life, for her separate use, to the dividends of a sum of stock, standing in the names of trustees, who were not parties to either action. Plaintiff had endeavoured to obtain a sequestration, but failed from not being able to find the Defendant's address so as to serve the subpœna for costs. He then moved the Court for a receiver, under sect. 25, sub-s. 8, of the *Judicature Act*, 1873. After service of the notice of motion, but before the motion was heard, the Defendant made an affidavit, in which her address

**PRACTICE**—*continued.*

was set forth:—*Held*, that the principle of *Anglo-Italian Bank* v. *Davies* (9 Ch. D. 275) applied, and that the Plaintiff was entitled to a receiver; and order made on the hearing of the motion accordingly. BRYANT *v.* BULL. BULL *v.* BRYANT. 153

19. —— *Service out of Jurisdiction—Foreigner resident abroad—Judicature Act*, 1873, *s.* 76—*Common Law Procedure Act*, 1852, *s.* 19—*Rules of Court*, 1875, *Order* II., *r.* 4; *Order* XI., *rr.* 1, 3, 5—*Appendix A., Forms* 2, 3.] In an action commenced in the Chancery Division the same rule applies as in the Common Law Divisions, that where a Defendant is a foreigner out of the jurisdiction he must be served with notice of the writ, and not with the writ itself. *In re* HOWARD. PADLEY *v.* CAMPHAUSEN - - C. A. 550

20. —— *Transferring Action—Winding-up—Ex parte Application—Rules of Court*, 1875, *Order* LI., *r.* 2*a*. When an order for the compulsory winding-up of a company has been made, an action against the company pending in another Division of the Court will be transferred on an application *ex parte*. *In re* LANDORE SIEMENS STEEL COMPANY - - - - 489

21. —— *Trial by Jury—Action to set aside Agreement for Fraud—Rules of Court*, 1875, *Order* XXXVI., *rr.* 3, 26.] The Plaintiffs brought an action in the Chancery Division to set aside an agreement on the ground that they had been induced to enter into it by the fraudulent representations of the Defendant. The pleadings having been closed the Plaintiffs gave notice of trial by jury. The Defendants thereupon moved that the action might be tried by the Judge without a jury:—*Held*, by *Malins*, V.C., that the case ought to be tried before the Judge without a jury.—*Held*, on appeal, that the discretion of a Judge as to the mode in which an action attached to his branch of the Court can be most conveniently tried will not be interfered with except in a very strong case, and that the order of the Vice-Chancellor must be affirmed.—*Per Jessel*, M.R.: Having regard to the nature of the action the discretion of the Vice-Chancellor had been rightly exercised. RUSTON *v.* TOBIN - C. A. 558

—— Administration action - - 468, 715
*See* ADMINISTRATION. 1, 3.

—— Bankruptcy - - - 3, 183, 776
*See* BANKRUPTCY. 2, 11, 20.

—— Lands Clauses Act - - - 131
*See* LANDS CLAUSES ACT.

—— Partition action - - 28, 289
*See* PARTITION. 1, 2.

—— Settled Estates Act - - 230, 499
*See* SETTLED ESTATES ACT. 1, 2.

—— Trustee Relief Act - - 228, 664
*See* TRUSTEE RELIEF ACT. 1, 2.

—— Trustee Acts - - - 29, 93
*See* TRUSTEE ACTS. 1, 2.

—— Winding-up petition - - 130, 487
*See* COMPANY. 9, 12.

**PREROGATIVE OF CROWN** - - 595
*See* BANKRUPTCY. 15.

**PRINCIPAL AND AGENT**—Bankruptcy—Reputed ownership - - - 566
*See* BANKRUPTCY. 13.

**PRINCIPAL AND SURETY**—*Current Account at Bankers—Appropriation of Payments—Guaranteed and unguaranteed Debt.*] A customer borrowed from his bankers £2000, which was placed to the credit of his current account, and to secure the debt gave them ten promissory notes payable at intervals of a week. At the same time a friend of the borrower wrote to the bankers as follows:—"You having this day at my request placed the sum of £2000 to the credit of Mr. *C.'s*" (the borrower's) "account with you, in the event of his promissory notes and interest or any of them representing that amount not being paid at the due dates, I hereby undertake, upon demand, to secure payment of the same," by a mortgage of certain specified property.—On the first five due dates, the sums represented by the first five notes respectively were debited by the bankers to the customer in the current account; and on each of the first two due dates enough cash was paid in to the account in the course of the day to liquidate the amount of the note. On the remaining three days the balance throughout the day was against the customer. The amounts of the last five notes were not entered by the bankers in the account at all. The payments in to the credit of *C.* to his current account and to another special account after the last note became due, were sufficient to cover all debits up to and including the last note; but the accounts were during all this time overdrawn:—*Held*, that the bankers were bound to apply all moneys paid in first to the notes secured by the surety which had fallen due; and that the debt was, moreover, discharged, on the principle of *Clayton's Case* (1 Mer. 605). KINNAIRD *v.* WEBSTER - - - - - 139

**PRIORITY**—Mortgage - - - 696
*See* MORTGAGE.

**PROBATE DIVISION**—Grant of administration disputed in Chancery Division - 372
*See* ADMINISTRATOR.

**PRODUCTION OF DOCUMENTS** - - 235
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**PROMOTION MONEY**—Company - - 450
*See* COMPANY. 6.

**PROOF**—Bankruptcy - - 554, 667
*See* BANKRUPTCY. 16, 17.

—— Winding up - - - - 720
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**PROSECUTION OF BANKRUPT** — Fraudulent debtor - - - - 774
*See* BANKRUPTCY. 18.

**PROSPECTUS**—Fraudulent - - - 502
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**PROXY**—Lunatic creditor—Liquidation proceedings - - - - - 554
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**RAILWAY COMPANY**—Lands Clauses Act 131
*See* LANDS CLAUSES ACT.

**REAL AND PERSONAL ESTATE**—Conversion
*See* ADMINISTRATION. 6. [172

**RECEIVER** - - - - - - 153
*See* PRACTICE. 18.

**REGISTRATION**—Bill of sale - 76, 313, 398
*See* BILLS OF SALE ACT. 1, 2, 3.

**REGISTRATION**—*continued.*

—— Copyright - - - - 247
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**RELIGIOUS EDUCATION** - - - 49
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**REMOTENESS** - - - - 264
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**RENT**—Future—Assignment of - - 615
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—— Minerals—Settled Estates Act - 499
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**REPUTED OWNERSHIP** - 408, 566, 591
*See* BANKRUPTCY. 12, 13, 14.

—— Mortgage attornment clause - - 335
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**REQUISITIONS ON TITLE**—Inquiry as to incumbrances - - - - - 365
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**RESCISSION OF CONTRACT**—Contract to take shares - - - - 502
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—— Sale of land - - - - 736
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**RESIDUE**—Duties payable on assets in a colony
*See* ADMINISTRATION. 5. [279

**RES JUDICATA**—Grant of letters of administration - - - - - 372
*See* ADMINISTRATOR.

**RETAINER**—Executor - - - 727
*See* ADMINISTRATION. 4.

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**RIPARIAN OWNERS** - - - 707
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**RIVER**—Right to use water for engine - 707
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*See* PRACTICE. 19.

—— **Order XI., rr. 1, 3, 4** - - - 550
*See* PRACTICE. 19.

—— **Order XVI., r. 7** - - - 28
*See* PARTITION. 1.

—— —— **r. 13** - - - - 768
*See* PRACTICE. 3.

—— **Order XIX., r. 3** - - - 359
*See* PRACTICE. 15.

—— —— **rr. 17, 22** - - - - 393
*See* PRACTICE. 4.

—— **Order XXII., r. 9** - - - 359
*See* PRACTICE. 15.

—— **Order XXVII., r. 1** - - - 502
*See* COMPANY. 2.

—— —— **r. 1** - - - - 768
*See* PRACTICE. 3.

—— **Order XXXI, r. 12** - - - 235
*See* PRACTICE. 2.

—— **Order XXXVI., rr. 3, 26** - - 553
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—— **Order XXXIX., r. 1a** - - - 432
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—— Order XL., r. 10 - - - 416
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*See* COMPANY. 5.
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—— (Costs), 1875, rr. 19, 28 - - 676
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**SALE**—By Court - - - - 136
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—— Goods—Bankruptcy of purchaser - 586
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—— Partition Act - - - - 289
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**SERVICE**—Out of jurisdiction - - 550
*See* PRACTICE. 19.
—— Petition for payment of money out of Court
*See* PRACTICE. 14. [481
—— Trustee Relief Act - - - 228
*See* TRUSTEE RELIEF ACT. 2.
**SET-OFF**—Debt against costs in action - 676
*See* PRACTICE. 13.
**SETTING DOWN APPEAL** - - - 613
*See* PRACTICE. 12.

**SETTLED ESTATES ACT** (19 & 20 *Vict. c.* 120), *s.* 23—*Minerals—Surface—Will.*] A testatrix, having an absolute power of appointment, gave the surface of land to her nephew, and the minerals under it to others. Under the *Settled Estates Act* a lease of the minerals had previously been made, and a part of the rents received had been set aside and was in the hands of trustees to be invested under the Act in the purchase of other land:—*Held*, that the rents so set aside were land in the hands of the trustees and passed with the surface. *In re* SCARTH - - - 499

2. —— (40 & 41 *Vict. c.* 18)—*Petition for Sale—Opposition of contingent Remainderman.*] Testator, being entitled in fee to a settled estate, subject to a shifting clause in favour of *A.* in the event of testator's children dying without issue under twenty-one, and being also seised in fee of another property adjoining and partly intermingled with the settled estate, devised all his real estate to trustees in trust for sale. Testator left four children, the eldest being twelve years old. The trustees presented a petition under the *Settled Estates Act*, 1877 (40 & 41 Vict. c. 18), for the sale of the two properties together and the apportionment of the purchase-money. *A.* opposed the sale:—*Held*, that *A.*'s interest was too remote to be considered, and the Court being satisfied on the evidence that the proposed sale would be more advantageous than if the properties were sold separately, the same was ordered accordingly. *In re* SPURWAY'S SETTLED ESTATES - - 230

**SETTLEMENT**—Equity to—Form of settlement
*See* HUSBAND AND WIFE. 2. [765
**SHARES**—Cancellation of - - - 502
*See* COMPANY. 2.
—— Paid-up—Money's worth—Services rendered
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—— Purchase of, at a discount—Director - 579
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**SLANDER OF TITLE**—Taking name of Plaintiff's house - - - - 294
*See* NAME OF HOUSE.

**SOLICITOR**—*Lien—Mortgage by Client to his Solicitor.*] A client mortgaged property, which was at the time subject to a first mortgage, to his solicitors, who prepared the mortgage deed to themselves. Afterwards the mortgagor made a third mortgage to another person:—*Held*, in an action by the solicitors against the first and third mortgagees and the mortgagor, that they were entitled only to their ordinary costs as mortgagees, and that they had no lien on the mortgage deed for the costs of its preparation or other costs due to them from the morfgagor. SHEFFIELD *v.* EDEN [C. A. 291

2. —— *Lien—Solicitors acting for a Company and for Trustees of Debenture Holders—Mortgagees' Title Deeds—Mortgagor's Costs.*] Solicitors of a company who, upon the occasion of the directors conveying all the property of the company to two of their body upon trusts to secure the repayment of moneys borrowed upon debentures, prepare a mortgage deed and act for the company and the trustees, have no right of lien for the payment of their costs.—The decision in *In re Snell* (6 Ch. D. 105) followed. *In re* MASON AND TAYLOR - - - - - 729

3. —— *Taxation of Costs—Bill of Costs paid*

**SOLICITOR**—*continued.*

*by Trustee in Bankruptcy—Application for Taxation by discharged Bankrupt—Solicitors Act* (6 & 7 *Vict. c.* 73), *s.* 39.] A bankrupt who has obtained his discharge and who has become entitled to the surplus of his estate, all the creditors having been paid in full, is not entitled, under the 39th section of the *Solicitors Act* (6 & 7 Vict. c. 73), to obtain the taxation of a bill of costs paid by the trustee in the bankruptcy.—The trustee in bankruptcy does not stand in the position of a trustee for the bankrupt. *In re* LEADBITTER - C. A. 388

—— Lien—Set-off of debt against costs - 676
*See* PRACTICE. 13.

—— Notice to—Mortgage—Priority—Costs 696
*See* MORTGAGE.

—— Requisitions on title—Inquiry as to incumbrances - - - - 365
*See* VENDOR AND PURCHASER. 2.

**STATUTE**—Construction—General and special Acts - - - - - 518
*See* WAY.

**STATUTES:**

21 Jac. 1, c. 26—*Limitations* - - 31
*See* LIMITATIONS, STATUTE OF.

29 Car. 2, c. 3, s. 4—*Statute of Frauds* 615
*See* ASSIGNMENT OF DEBT.

6 Anne, c. 18—*Tenants for Life* - - 166
*See* TENANT FOR LIFE.

57 Geo. 3, c. xxix.—*Metropolitan Paving Act*
*See* PRACTICE. 14. [481

11 Geo. 4 & 1 Will. 4, c. 46—*Appointments* 484
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5 & 6 Will. 4, c. 76, s. 92—*Municipal Corporation* - - - - - 204
*See* MUNICIPAL CORPORATION.

6 & 7 Vict. c. 73, s. 39—*Solicitors* - 388
*See* SOLICITOR. 3.

8 & 9 Vict. c. 18, ss. 85, 87—*Lands Clauses*
*See* LANDS CLAUSES ACT. [131

13 & 14 Vict. c. 60—*Trustee Act* - 29, 93
*See* TRUSTEE ACTS. 1, 2.

15 & 16 Vict. c. 76, s. 19—*Common Law Procedure* - - - - - 550
*See* PRACTICE. 19.

17 & 18 Vict. c. 36, ss. 1, 2, 3—*Bills of Sale* [76, 313, 398
*See* BILLS OF SALE. 1, 2, 3.

—— —— - - - - - 335
*See* COMPANY. 8.

17 & 18 Vict. c. 113—*Locke King's Act* - 460
*See* ADMINISTRATION. 7.

19 & 20 Vict. c. 120, s. 23—*Settled Estates* [230, 499
*See* SETTLED ESTATES ACT. 1, 2.

24 & 25 Vict. c, 45, ss. 11, 14—*Piers and Harbours* - - - - - 518
*See* WAY.

25 & 26 Vict. c. 86, s. 11—*Lunacy Regulation*
*See* LUNATIC. 1. [552

25 & 26 Vict. c. 89, s. 165—*Companies* 118,
*See* COMPANY. 5, 6, 7. [450, 579

30 & 31 Vict. c. 131, s. 26—*Companies* - 720
*See* COMPANY. 4.

**STATUTES**—*continued.*

30 & 31 Vict. c. 131, s. 27 - - 118
*See* COMPANY. 7.

31 & 32 Vict. c. 40—*Partition* - - 28
*See* PARTITION. 1.

32 & 33 Vict. c. 62, s. 4—*Debtors Act* 285,
*See* ARREST. 1, 2. [286, n.

—— —— ss. 11, 16, 17 - - - 774
*See* BANKRUPTCY. 18.

32 & 33 Vict. c. 71, s. 6—*Bankruptcy* - 681
*See* COMPANY. 11.

—— —— ss. 6, 87 - - - 313
*See* BANKRUPTCY. 1.

—— —— s. 7 - - - - 573
*See* BANKRUPTCY. 4.

—— —— ss. 10, 11 - - - 3
*See* BANKRUPTCY. 2.

—— —— s. 15 - - 408, 566, 591
*See* BANKRUPTCY. 12, 13, 14.

—— —— s. 23 - - - - 100
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—— —— s. 28 - - - - 179
*See* BANKRUPTCY. 3.

—— —— ss. 32, 49 - - - 595
*See* BANKRUPTCY. 15.

—— —— s. 54 - - - - 776
*See* BANKRUPTCY. 20.

—— —— ss. 65, 72 - - 575, 610
*See* BANKRUPTCY. 8, 9.

—— —— ss. 65, 125 - - - 183
*See* BANKRUPTCY. 11.

—— —— s. 72 - - - - 94
*See* BANKRUPTCY. 10.

—— —— s. 87 - - - - 169
*See* BANKRUPTCY. 5.

—— —— s. 91 - - - - 622
*See* VOLUNTARY SETTLEMENT.

33 & 34 Vict. c. 104, s. 2—*Companies Arrangement* - - - - 270, n.
*See* COMPANY. 13.

35 & 36 Vict. c. 91, s. 8—*Municipal Corporation* - - - - - 204
*See* MUNICIPAL CORPORATION.

36 & 37 Vict. c. 66, s. 10—*Judicature Act* 681
*See* COMPANY. 11.

—— —— s. 25, sub-s. 8 - - - 153
*See* PRACTICE. 18.

—— —— —— - - - - 294
*See* NAME OF HOUSE.

—— —— s. 76 - - - - 550
*See* PRACTICE. 19.

39 & 40 Vict. c. 17—*Partition* - 28, 289
*See* PARTITION. 1, 2.

40 & 41 Vict. c. 18—*Settled Estates* - 230
*See* SETTLED ESTATES ACT. 2.

41 & 42 Vict. c. 54, s. 1—*Debtors Act* 285,
*See* ARREST. 1, 2. [286, n.

**SUBMISSION TO ARBITRATION**—Partnership
*See* PARTNERSHIP. 1. [185

**SURETY** - - - - - 139
*See* PRINCIPAL AND SURETY.

**TAXATION**—Bill of costs - - - 388
*See* SOLICITOR. 3.

**TENANT FOR LIFE**—*Freeholds—Reversionary Interest—Production of Cestui que Vie by Party in Possession—6 Anne, c.* 18.] Where an application is made under the statute 6 Anne, c. 18, s. 1, to the party in possession of an estate for the production of a *cestui que vie* to the person entitled to the estate in remainder, and the party in possession does not respond to the application, the applicant is entitled to an order for production. *In re* Owen - - - - - 166

**TIME**—Appeal - - 420, 432, 613
*See* Practice. 10, 11, 12.

**TITLE DEEDS**—Mortgage—Lien—Solicitor 729
*See* Solicitor. 2.

**TITLE OF BOOK**—Copyright - - 247
*See* Copyright.

**TRADE NAME**—Dissolution of partnership—Right to use - - - 436
*See* Partnership. 3.

**TRADER**—Execution against—Debt above £50
*See* Bankruptcy. 5. [169

—— Voluntary settlement by bankrupt - 622
*See* Voluntary Settlement.

**TRANSFER OF ACTION** - - - 489
*See* Practice. 20.

**TRIAL BY JUDGE WITHOUT JURY**—Appeal—Time - - - - 432
*See* Practice. 11.

**TRIAL BY JURY** - - - - 558
*See* Practice. 21.

**TRUSTEE**—*Discretion of Trustees—"Uncontrolled and Irresponsible."*] Where in a marriage settlement the trustees had power to apply the income of the settled fund for the benefit of the husband and wife and their children as they should "in their uncontrolled and irresponsible discretion think proper," the Court, while expressing an opinion that the trustees were not acting judiciously, declined to interfere with their discretion, there being no proof of *mala fides*. Tabor v. Brooks - - - - - 273

—— Appointment of—Lunatic out of jurisdiction
*See* Trustee Acts. 1. [29

—— Defaulting—Attachment - 285, 286, n.
*See* Arrest. 1, 2.

—— Notice to—Mortgage - - - 696
*See* Mortgage.

—— Representation of *cestui que trusts* - 28
*See* Partition. 1.

**TRUSTEE IN BANKRUPTCY**—Claim against stranger—Jurisdiction - - 94
*See* Bankruptcy. 10.

—— Disclaimer - - - - 100
*See* Bankruptcy. 7.

—— Payment of bill of costs—Taxation by bankrupt - - - - - 388
*See* Solicitor. 3.

—— Right to complete bankrupt's contract—Costs - - - - 586
*See* Bankruptcy. 6.

—— Title of - - - - - 595
*See* Bankruptcy. 15.

**TRUSTEE ACTS**—*Appointment of New Trustees—Vesting Order—Lunatic Trustee out of Jurisdiction—Order in Lunacy as well as in Chancery.*] A petition for the appointment of new trustees and for a vesting order, where the existing sole trustee is of unsound mind and out of the jurisdiction, need not be presented in Lunacy as well as in Chancery. *In re* Gardner's Trusts 29

2. —— *Lunacy—Vesting Order.*] The sole surviving trustee of a sum of stock under a settlement having become of unsound mind, the persons beneficially entitled presented a petition in Lunacy for an order vesting in them the right to transfer the stock and receive the dividends:—*Held*, that such an order ought not to be made, as it would be administering the trust in Lunacy; but, on the petition being amended and intituled in the Chancery Division as well as in Lunacy, an order was made appointing the Petitioners trustees of the settlement, and vesting in them, as such, the right to transfer the stock and receive the dividends. *In re* Currie - - - 93

**TRUSTEE RELIEF ACT**—*Chancery Funds (Amended) Orders*, 1874, *r.* 5—*Payment into Court.*] Where the person mentioned in an affidavit on payment into Court under the *Trustee Relief Act* as being the person interested in the fund, could not be found, an opinion was intimated as to what would probably be held sufficient notice of the payment in, but the Court declined to give any directions. *In re* Hardley's Trusts C. A. 664

2. —— *Practice—Payment out of Court—Numerous Parties interested—Service on absent Parties—Form of Order.*] On a petition under the *Trustee Relief Act* for payment out of Court of a fund to which numerous parties were entitled, most of whom were not before the Court, a former order having been made directing class inquiries, and the Chief Clerk having made his certificate, it was ordered that the Petitioner be at liberty to serve a copy of the petition, the former order, and the Chief Clerk's certificate, together with the present order, upon the several persons named in the certificate, and that the petition stand over till such persons had been served. *In re* Battersby's Trusts - - - - - 228

**UNDERLEASE**—Merger—Administrator - 743
*See* Merger.

**UNDISCHARGED BANKRUPT** - 434, 776
*See* Bankruptcy. 19, 20.

**UNSOUND MIND**—Person of - 29, 93
*See* Trustee Acts. 1, 2.

—— Person of—Infant—Jurisdiction - 605
*See* Infant. 4.

—— Person of—Petition for liquidation - 183
*See* Bankruptcy. 11.

—— Person of—Production of documents—Affidavit - - - - - 235
*See* Practice. 2.

**VALUABLE CONSIDERATION**—Purchase for
*See* Voluntary Settlement. [622

**VENDOR AND PURCHAS**—*Assignment of Lease of Public-house—Contract for a Term certain—Lessors' Right of Option to determine Lease—Contract rescinded—Deposit Money returned.*] S., being in the occupation of a public-house, contracted with W. to sell to him the residue of the

**VENDOR AND PURCHASER**—*continued.*

lease, of which twelve and a half years at least were unexpired. *W.*, the day after signing the contract, by which he agreed to take possession on the 15th of April, 1878, paid a sum as a deposit to *S.'s* agent. The abstract of title shewed that *S.'s* lessors had a right of option to determine the lease at the end of five years, and *W.* at once rescinded the contract, and required the return of the deposit money. *S.* refused to repay the money, and *W.* issued a writ in his action on the 10th of April to recover it:—*Held*, that *W.'s* objection to the title was valid; that he was not bound to wait till the 15th of April before issuing the writ; and that he was entitled to repayment of the deposit money with interest. Weston *v.* Savage - 736

2. —— *Inquiry as to Incumbrances.*] A purchaser made the following requisition, "Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?":—*Held*, by *Hall*, V.C., on an application under the *Vendor and Purchaser Act*, 1874, that the vendor's solicitors must make a complete answer to the requisition, and order made on them accordingly.—*Held*, on appeal, that neither the vendors nor their solicitors were bound to answer any part of the requisition. *In re* Ford and Hill - - - - - C. A. 365

**VERDICT**—Time for appealing against 420, 432
*See* Practice. 10, 11.

**VESTING ORDER** - - - 29, 93
*See* Trustee Acts. 1, 2.

**VOLUNTARY SETTLEMENT** — *Trader — Leaseholds — Purchaser for Valuable Consideration — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 91.] The word "purchaser" in sect. 91 of the *Bankruptcy Act*, 1869, means a "buyer" in the ordinary commercial sense, not a purchaser in the legal sense of the word. Therefore, the trustee of a post-nuptial settlement of leaseholds for the benefit of the settlor's wife and children is not a purchaser of the property for valuable consideration within the meaning of sect. 91.—*Price* v. *Jenkins* (5 Ch. D. 619) distinguished. *Ex parte* Hillman. *In re* Pumfrey - C. A. 622

**VOLUNTARY WINDING-UP** - - 118
*See* Company. 7.

**WATER**—*Easement—Riparian Owner—Right to use Water for supply of Engines — Damage to Lower Owners.*] A railway company whose line crossed a stream in the immediate neighbourhood of one of their stations, took water for supplying their engines and for the general purposes of the station. On bill filed by a millowner lower down the stream, it appeared that the abstraction of water did no damage in wet weather, and never shortened the working of the mill for more than a few minutes a day:—*Held*, that the company, as riparian owners, were entitled to take a reasonable quantity of water for their purposes, and that in this case the quantity taken was reasonable. Earl of Sandwich *v.* Great Northern Railway Company - - - - - 707

**WAY** — *Public Right — Implied Extinction by Statute—Construction of Statute—Saving Clause in General Act—Inconsistent Provision in subsequent Special Act—General Pier and Harbour Act*, 1861 (24 & 25 *Vict. c.* 45), *ss.* 11, 14.] A public right of way may be extinguished by statute by necessary implication as well as by express words.—A saving clause in a general Act has no operation if it is inconsistent with the express provisions of a subsequent special Act.—The saving clauses (sects. 11 and 14) of the *General Pier and Harbour Act*, 1861, do not apply to a public right of way.—A corporation were empowered by a provisional order of the Board of Trade, made under the authority of the *General Pier and Harbour Act*, 1861, and confirmed by a subsequent special Act, to construct a pier in accordance with certain deposited plans. The plans shewed that the pier, when constructed, would be physically inconsistent with the existence of an alleged public right of access to the sea-shore from a street with which the pier was connected. The provisional order contained no words expressly extinguishing the right of way, or substituting another right of way for it:—*Held*, that, if the alleged right of way had ever existed, it was extinguished by necessary implication, and that it was not saved by sects. 11 and 14 of the *General Pier and Harbour Act*, 1861. Corporation of Yarmouth *v.* Simmons - - 518

**WIDOW** — Pension — *East India Company's* trust fund - - - - 490
*See* Husband and Wife. 1.

**WILL** — *Construction — Absolute Gift by Will — Gift by Codicil of what "may then be remaining"—Absolute Gift cut down to Life Interest.*] *E.* and *A.*, sisters, were tenants in common of freehold and leasehold property.—*E.* by her will gave all her estates and effects, both real and personal, to *A.* absolutely, and by a codicil which she directed to be taken as part of her will she gave, after the death of *A.*, "all property of mine which may then be remaining" (except a house and furniture) "to my brother *W. B.*" and three other persons in certain proportions, "my brother *W. B.* to have one-half of the property for his whole and sold disposal."—*A.*, who survived *E.* a year and eight months, remained in possession of the whole of the property, and by her will gave a portion of it to *W. B.* for life only, and after his death to other persons.—On bill filed by *W. B.*, for administration of both estates:—*Held*, that the intention of *E.* was, construing the two instruments together, that *A.* should have a life interest only in her property. Bibbens *v.* Potter [733

2. —— *Construction — Forfeiture Clause — Bankruptcy in Testatrix's Life — Administration Suit — Annulment.*] Testatrix, who died in February, 1875, by her will in February, 1874, bequeathed the residue of her property to trustees to pay the residue of the income in fourths to her sons and granddaughters for life, and there was a clause of forfeiture in case either of the sons or granddaughters should become insolvent or be declared bankrupt.—*W.* (a son) was adjudicated bankrupt in June, 1873. The testatrix was a creditor, and proved in the bankruptcy. In March, 1875, *W.* offered a composition, and it was accepted by the creditors, but the arrangement could not at that time be carried into effect.

**WILL**—*continued.*

The trustees under the will filed a bill in July, 1875, for the administration of the trusts, and the usual decree was made in July, 1876. In May, 1878, the composition was agreed upon and approved by the Court in June following, and an order was made for the annulment of the bankruptcy. On further consideration of the cause:—*Held*, that, upon the principle laid down in *White* v. *Chitty* (Law Rep. 1 Eq. 372) and *Lloyd* v. *Lloyd* (Law Rep. 2 Eq. 722), and in *In re Parnham's Trusts* (Law Rep. 13 Eq. 413), there was not a forfeiture. Ancona *v.* Waddell - 157

3. —— *Construction—Gift of Personal Estate to A. for Life with Remainder to his "Lawful Heirs"—Literal Construction.*] Bequest of personal estate to "the children of *A.* during their lives, and on the decease of either of them his or her share of the principal to go to his or her lawful heir or heirs":—*Held*, that "lawful heir or heirs" must be read literally, and not as meaning "next of kin" "executors or administrators," or "children."—*Mounsey* v. *Blamire* (4 Russ. 384) disapproved of. Smith *v.* Butcher - 113

4. —— *Construction—Gift to "Children of A. who shall attain Twenty-one"—Separate Legacies—Time of ascertaining Class—After-born Children.*] Bequest of "the sum of £100 to each of the children of my niece *M.* who shall live to attain the age of twenty-one years."—The niece survived the testatrix, and was still living, but had not yet had any children:—*Held*,—applying the rule that, under a gift of a certain sum to each of a class of objects at a future period, objects born after the testator's death cannot be admitted,—that no child the niece might have could take under the bequest. Rogers *v.* Mutch [25

5. —— *Construction—"Household Furniture"—Leasehold House—Tenant's Fixtures.*] As a general rule, a bequest of "household furniture" will not pass the tenant's fixtures in a leasehold house occupied by the testator. Finney *v.* Grice [13

6. —— *Construction—Illegitimate Children—All the Children of A. and B.*] A testatrix gave a sum of stock to trustees to pay the dividends to her brother *Charles* and his wife *Elizabeth* for their lives, and after the decease of the survivor, the capital to be divided between all the children of her brother. The brother had three children by his first wife, two children by his second wife *Elizabeth* before marriage, and one child after marriage, which were facts well known to the testatrix, who promised, as the claim alleged, that if he married his wife *Elizabeth* she would provide for all his children by her, and she in fact treated all the children equally as her nephews and nieces, and it was further alleged that the testatrix gave instructions that her will should be so drawn as to provide equally for both classes of children, and

**WILL**—*continued.*

that she believed such to be the effect of the words of the will:—*Held*, upon demurrer, that the illegitimate children must be excluded from the bequest; and that the words of the will being distinct, no extrinsic evidence could be received to shew what the intention of the testatrix was.—*Laker* v. *Hordern* (1 Ch. D. 644) commented upon. Ellis *v.* Houstoun - - - - 236

7. —— *Construction — Remoteness — Gift to a Class—Gift to Children at Twenty-five.*] Testator gave his real and personal property upon trust for the children of his daughters who should live to attain twenty-five. At his death one of his daughters had a child who had attained twenty-five:—*Held*, that this gift was not void for remoteness, but was a valid gift to such of the children living at the testator's death as should attain twenty-five. Picken *v.* Matthews - 264

6. —— *Construction — Ultimate Remainder, after Life Estate in S., and Estate Tail in the Children of S., "in default of issue" of S. to the "right heirs" of S. "for ever"—Effect of Bequest of Leaseholds under the same Limitations.*] A testator by will made in 1820, devised and bequeathed freeholds and leaseholds together to his daughter *S.* for life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, and "in case of default of issue" of *S.*, to "the right heirs" of *S.* "for ever."—*S.* having married and died a widow, without having had a child:—*Held*, that she took an absolute interest in the leaseholds.—*Herrick* v. *Franklin* (Law Rep. 6 Eq. 593, 596) explained. Comfort *v.* Brown - - 146

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*See* Cases under Company. 3—13.

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**WORDS**—"All the children of *A.* and *B.*" 236
*See* Will. 6.

—— "Business" - - - - 691
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